# SUPPLEMENT

TO THE

# American Journal of International Law

VOLUME 20 SPECIAL NUMBERS

## JULY AND OCTOBER, 1926

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DOCUMENTS FROM THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

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PROJECTS OF CONVENTIONS PREPARED BY THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

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PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

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2 JACKSON PLACE
WASHINGTON, D. C.

General
Walsh

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### FIRST SESSION OF COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW



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NOTE—This Supplement is separately paged and indexed, in order that these texts may be bound by themselves

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## SECOND SESSION OF COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

## COLLABORATION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW WITH THE LEAGUE OF NATIONS' COMMITTEE OF EXPERTS

*The Director of the Legal Section of the League of Nations to the President of the American Society of International Law*

LEAGUE OF NATIONS, Geneva, *April 1st, 1925.*

Sir,

On September 22nd, 1924, the Assembly of the League of Nations adopted a Resolution concerning the progressive codification of international law.

You will notice that, in accordance with the terms of this Resolution—a copy of which is attached—the Council is requested to convene a Committee of Experts to study this question of progressive codification and eventually to submit a report to the Assembly. You will also observe that the Assembly Resolution provides for "the eventual consultation of the most authoritative organisations which have devoted themselves to the study of international law, without trespassing in any way upon the official initiative which may have been taken by particular States."

A Committee of Experts was duly appointed by the Council at its December session and is holding its first session from April 1st; in accordance with a unanimous decision of the Committee, the Chairman of this Committee has instructed me to send you the following communication on his behalf.[1]

The Committee is anxious to get into immediate touch with your Institution, and to consult you regarding the matters which it will be called upon to consider.

In the interests of the development of international law, it would be very desirable for members of the Committee to obtain the benefit of the great experience which your Institution has acquired on the subject.

I would therefore request the American Society of International Law to be good enough to consider what, within the meaning of the Assembly Resolution, are the problems of international law, the solution of which by international agreement would seem to be most desirable and most easily realised.

Your Institution may perhaps desire to submit this question to its annual Assembly. You might perhaps also consider the possibility of immediately

[1] The Committee of Experts is composed of the following members: Hj. L. Hammarskjöld, of Sweden, Chairman; Cristobal Botella, Spain; J. L. Brierly, Great Britain; Giulio Diena, Italy; Henri Fromageot, France; Gustavo Guerrero, Salvador; B. C. J. Loder, The Netherlands; Barboza de Magalhaes, Portugal; Adalbert Mastny, Czechoslovakia; M. Matsuda, Japan; Simon Rundstein, Poland; Walther Schücking, Germany; José León Suárez, Argentina; Ch. de Visscher, Belgium; Chung Hui Wang, China; George W. Wickersham, United States; and Sir Muhamed Rafique, expert in Moslem law. — (*Monthly Summary of the League of Nations*, January, 1926, p. 16).

appointing a special committee for the purpose of drafting a preliminary reply to the Committee of Experts; or, through your Secretariat, you might be able to place at the disposal of the Committee, such data as may be required for its work.

In any case, it would be for the plenary meetings to submit final proposals to the Committee later on, and in the meantime close contact would have been established between your Institution and the Committee.

It is expected that the next session of the Committee will take place during this year, probably in November. At this session the Committee will take up the questions submitted to it and any observation which you would care to make would naturally be of great assistance to the Committee at that time.

I would desire to make it clear, however, that of course your Institution is entirely free to adopt whatever procedure it thinks best: the suggestions which I have made are merely tentative.

I would venture to thank you in advance for the assistance which I am sure you will be good enough to afford us.

I have the honour to be, Sir,

Your obedient Servant,

(*Signed*) VAN HAMEL,
*Director of the Legal Section.*

The Chairman of the
American Society of International Law,
2 Jackson Place, Washington, D. C.

[Enclosure]

FIFTH ASSEMBLY OF THE LEAGUE OF NATIONS

GENEVA, *September 22nd, 1924.*

DEVELOPMENT OF INTERNATIONAL LAW

*Resolution adopted (on the Report of the First Committee) by the Assembly at its meeting held on Monday, September 22nd, 1924 (morning)*

The Assembly,

Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to communications and transit, the simplification of customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolution concerning legal assistance for the poor:

Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

Requests the Council:

To convene a committee of experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilisation and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment; and

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

*The Director of the Legal Section of the League of Nations to the President of the American Society of International Law*

LEAGUE OF NATIONS, Geneva, *11th April, 1925.*

Sir,

In continuation of my letter of April 1st, 1925, I have the honour to transmit to you enclosed the list,[1] provisional in character, of subjects upon which the Committee of Experts for the Progressive Codification of International Law, at its session ending April 8th last, decided that its sub-committees should report to it at its next session, which will probably be held at the end of the year.

The Committee decided that this provisional list should also be sent to the associations with which it has entered into communication, in order to allow them to make any observations which they may desire.

You will find enclosed particulars as to the sub-committees and their *rapporteurs*.[2]

It is to be understood that, as appears from the preamble, the Committee, in indicating the subjects, has not had the intention of finally determining the subjects which are to be placed before the governments. The Committee has not at present gone beyond a preliminary enquiry as to what fields should be investigated with a view to later elaboration of detailed proposals.

The Committee has expressed the desire to receive the reports of its sub-committees not later than October 15th next. Your association may per-

[1] Printed *supra*, p. 1.

[2] *Infra*, p. 15.

haps find it possible to present its observations by the same date. If by this date it is not in a position to present observations in a final form, your association may perhaps be able to send the Committee preliminary remarks in one of the forms indicated in my letter of April 1st, 1925.

I am to add that the Committee has requested its sub-committees to deal with the subjects entrusted to them in such a way as to include in their reports, lists and questionnaires relating to all the details of the subject matter. This method has been considered desirable in view of the intention of ultimately preparing draft conventions.

The reports should generally indicate under separate heads—and, as a rule, in the form of questions—all the details which in one form or another may later appear as separate provisions of a draft convention.

You may perhaps find it convenient that your association, in any memoranda which it desires to present to the Committee of Experts, should follow the same method of detailed treatment.

I have the honour to be, Sir,

Your obedient Servant,

(*Signed*) VAN HAMEL,
*Director of the Legal Section.*

The Chairman of the
American Society of International Law,
2 Jackson Place, Washington, D. C.

## AMERICAN SOCIETY OF INTERNATIONAL LAW

### REPORT OF THE STANDING COMMITTEE ON EXTENSION OF INTERNATIONAL LAW[1]

*Submitted to and Approved by the Executive Council of the Society, April 25, 1925*

To the Council of the American Society of International Law:

At a meeting of the Council held April 24, 1925, there were referred to the Standing Committee of the Society on Extension of International Law communications addressed to the Chairman of the American Society of International Law by the Director of the Legal Section of the Secretariat of the League of Nations, dated April 6 and April 8 last. This Committee was directed to report to the Council at its meeting of April 25 its conclusions as to the manner and method in which the said communications should be considered by the Council. The communications disclose that the Committee of Experts created by the League of Nations for the development of international law is desirous of making contact with the American Society of International Law, as with other learned societies, and to consult with it concerning the matters to be considered by the Committee. Specifically

[1] Jesse S. Reeves, Chairman; Edwin M. Borchard, Charles G. Fenwick, Charles Cheney Hyde, Manley O. Hudson, Fred K. Nielsen, Quincy Wright.

the American Society of International Law is requested to consider what are the problems of international law the solution of which by international agreement would seem to be most desirable and most easily realized. It is a question of preparing a list of topics and not a draft of conventions. The communication indicates the desire of the Committee of Experts that the American Society of International Law choose its own means of arriving at such conclusions and of indicating them. It would seem further that the Committee of Experts would appreciate the receipt by them of whatever published material there may be issued by the Society bearing upon the general and specific problems before them.

Your Committee considers that a favorable response to the communications referred to is quite in line with the activities of this Society for many years and especially since the receipt of the Report of the Advisory Committee of Jurists at The Hague which was charged with drafting a plan for the Permanent Court of International Justice in 1920. That report included several recommendations which learned societies whose special field was international law were requested to take under consideration. These recommendations had in mind especially the restatement and clarification of principles of international law as well as the consideration of subjects not at present considered as within the scope of international law, but which might properly be brought within it. In line with the recommendation of the Committee of Jurists this Society devoted two of its annual sessions to the consideration of the topics suggested by the Advisory Committee, created special committees for the consideration of specific topics under the general recommendations, and furthermore created a Standing Committee on the Extension of International Law, all of which activities are sufficient evidence of the long and continued interest of this Society in the aims which animate the Committee of Experts now created with which coöperation has been invited. The Society was eager to extend hospitable consideration to the Resolution of the Advisory Committee of Jurists in 1920, more especially because of the participation in the work of that Committee of its honored President, Mr. Elihu Root, and at the present time it is desirous of extending the same hospitable consideration to the invitation of the Committee of Experts in which the Honorable George W. Wickersham, one of its most prominent members, is playing an important part.

The Committee therefore recommends to the Council of the American Society of International Law the following action to be taken with reference to the invitation of the Committee of Experts:

1. The Council of the American Society of International Law welcomes the invitation of the Committee of Experts and notes with great satisfaction the progress which has been made by the Committee toward the initiation of a process which it is to be hoped will lead to the development of international law in various fields. The Council therefore accepts the invitation of the Committee of Experts to collaborate in its work and takes satisfaction

in the opportunity thus afforded for the realization of the purpose of the Society as expressed in Article 2 of its Constitution.

2. As a procedure for undertaking such coöperation the Council decides to request the President of the Society to appoint a committee of five or seven members from the Society at large[1] for the purpose of drafting a report to be submitted to the Council for its consideration with a view to its later submission to the Committee of Experts on behalf of the Society. This special committee is requested to circulate a draft of a report to each member of the Council not later than September 26, 1925, and the President of the Society is requested to summon a special meeting of the Council for dealing with this report on or about September 26, 1925, in order that whatever communication the Council decides is proper and appropriate may be in the hands of the Committee of Experts at Geneva by October 15, 1925. The special committee is directed to consider what are the subjects of international law the solution of which by international agreements appears the most desirable and possible of realization.

3. The Council further decides to instruct the Secretary to forward to the Secretary of the Committee of Experts immediately seventeen copies of the Proceedings of the Society for 1921, 1922, 1923, 1924 and 1925, and to inform the Secretary of the Committee of Experts that the Society stands ready to furnish the Committee with any further documentation concerning its work which may be requested.

*The Corresponding Secretary of the American Society of International Law to the Director of the Legal Section of the League of Nations*

AMERICAN SOCIETY OF INTERNATIONAL LAW
2 Jackson Place, Washington, D. C., *May 15, 1925.*

My dear Sir,

Your letters of April 1st and 11th inviting the coöperation of the American Society of International Law in the work of the Committee of Experts appointed by the League of Nations for the progressive codification of international law, were duly received and submitted to the Society at its Annual Meeting held in Washington April 23–25, 1925. Your communications were given careful consideration at two meetings of the Executive Council, acting in behalf of the Society, and I take pleasure in enclosing herewith a copy of a report prepared by the Society's Standing Committee on the Extension of International Law, approved by its Executive Council, and its recommendations adopted on April 25, 1925.

Pursuant to the instructions contained in paragraph 3 of the recommendations of this report, there are being transmitted to you by mail seventeen copies of the Proceedings of the Society for the years 1921, 1922, 1923 and

[1] Jesse S. Reeves, Chairman; Edwin M. Borchard, Philip Marshall Brown, Charles G. Fenwick, Arthur K. Kuhn, Ellery C. Stowell, Quincy Wright.

1924. A like number of copies of the Proceedings for the year 1925 will be forwarded as soon as the volume is published.

Will you kindly see that these volumes are presented to the members of the Committee of Experts, informing them at the same time that this Society stands ready to furnish the Committee with any further documentation concerning its work which may be requested.

I am

Very truly yours,
(Signed) WILLIAM C. DENNIS,
*Corresponding Secretary.*

DR. J. A. VAN HAMEL,
*Director of the Legal Section, League of Nations,*
Geneva, Switzerland.

*The Director of the Legal Section of the League of Nations to the Corresponding Secretary of the American Society of International Law*

LEAGUE OF NATIONS, GENEVA, *May 30, 1925.*

Sir,

I have the honour to acknowledge receipt of your letter of May 15th, 1925, concerning the Progressive Codification of International Law, by which you were good enough to forward to me a copy of a report prepared by the Standing Committee of the American Society of International Law, on the Extension of International Law, approved by its Executive Council, and its recommendations adopted on April 25, 1925.

I have the honour to thank you for your letter and the report annexed thereto, a copy of which I shall not fail to transmit to the Chairman of the Committee of Experts for the Progressive Codification of International Law. I shall be glad to transmit to the members of the Committee a copy of the Proceedings of the Society for the years 1921, 1922, 1923 and 1924, which you were good enough to send to me.

I have the honour to be, Sir,

Your obedient Servant,
(Signed) VAN HAMEL,
*Director of the Legal Section.*

WILLIAM C. DENNIS, Esq.,
*Corresponding Secretary of the American Society of International Law,*
2 Jackson Place, Washington, D. C.

*The Acting Director of the Legal Section of the League of Nations to the President of the American Society of International Law*

LEAGUE OF NATIONS, Geneva, *April 1st, 1926.*

Sir,

I have the honour to inform you that the Committee of Experts for the Progressive Codification of International Law has decided, in the course of

its second session held in January of this year, to set up sub-committees to study a certain number of questions.

In continuation of the letters of 1st and 11th April 1925, addressed to your Association by Dr. van Hamel, late Director of the Legal Section, I beg to send you enclosed a list of the above-mentioned questions,[1] which list also indicates the *rapporteurs* and the composition of the sub-committees.

In addition to these subjects, the Committee hopes to have before it at its next session a report by M. de Visscher, Professor at the University of Ghent, on the question of the application in international law of the conception of prescription.

I should also inform you that the Committee has expressed the desire to receive the reports of its sub-committees not later than October 15th next. The Committee would appreciate receiving by the same date any observations which your Association may wish to present.

At the request of the Chairman of the Committee, I have also pleasure in sending your Association for its information, under separate cover, copies of seven questionnaires which have been addressed by the Committee to the various Governments, together with copies of three reports drawn up by the Committee in the course of its second session.[2]

I have the honour to be, Sir,

Your obedient Servant,

(*Signed*) H. McKinan Wood,
*Acting Director of the Legal Section.*

The Chairman of the
American Society of International Law,
2 Jackson Place, Washington, D. C.

## American Society of International Law

### Report of Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law

*Submitted to and approved by the Executive Council of the Society, April 24, 1926*

Your Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, appointed at the last Annual Meeting of this Society, was instructed as follows: To circulate a draft of a report to each member of the Council on or before September first, 1925, setting forth what in the opinion of the Committee were the subjects of international law, the solution of which by international agreements appeared the most desirable and possible of realization. The date set for the report was fixed in order that the Council might con-

[1] *Infra*, pp. 17–18.
[2] Printed *infra*.

sider the report and if approved it be transmitted to the Committee of Experts for the Progressive Codification of International Law under the auspices of the League of Nations at its meeting in Geneva, which was set for November of 1925.

Of the seven members appointed upon the Special Committee of your Society four were absent from the United States during the summer, and beyond the time set for the filing of the Committee's report. It was therefore impossible for the Committee to follow the exact instructions given it, and the Committee was unable to meet within the time set. The special urgency for a report having thus disappeared, the Committee did not meet for further consideration of the matter until the time of the present annual meeting. In the meanwhile, however, correspondence was had with reference to the consideration of topics to be suggested to be submitted to the Geneva Committee.

At the present time there have been adopted by the Committee of Experts for the Progressive Codification of International Law twenty-one topics as more or less suitable for consideration, and they are as follows:

1. Nationality.
2. Territorial waters.
3. Diplomatic privileges and immunities.
4. Public vessels engaged in commerce.
5. Extradition.
6. Responsibilities of states for damages to aliens in person or goods.
7. Procedure of international conferences; the drafting of treaties.
8. Piracy.
9. Prescription.
10. Exploitation of marine resources.
11. Extraterritorial criminal jurisdiction.
12. Commissions rogatory in penal matters.
13. International corporations formed not for profit.
14. Domicile.
15. Consuls.
16. Most-favored-nation clause.
17. Revision of established classification of diplomatic agents.
18. Jurisdiction of national courts over foreign states.
19. The nationality of commercial corporations and their diplomatic protection.
20. Recognition of juridical personality of foreign commercial corporations.
21. Conflicts of laws as to sales of merchandise.

The Committee, while recognizing that each of these topics might properly be considered scientifically looking toward an authoritative statement of the law involved under each topic, it does not feel justified at this time to indicate what it believes to be the relative importance and urgency of the

various topics, but does take occasion to express its conviction that those topics which fall under the general heading of private international law might well yield precedence in consideration to those topics more plainly in the field of public international law, and that priority of consideration should be given to those topics of most urgent importance and upon which it seems more likely that an agreement may be reached. The Committee has had under consideration a number of topics which it deems appropriate for transmission to the Committee of Experts at Geneva, and now recommends that the following topics be so transmitted:

1. State succession.
2. Criteria of *de facto* recognition of new states and new governments.
3. Canons of interpretation of treaties.
4. International servitudes.
5. The civil and commercial status of aliens transient and resident.

Very recently there have been received by the Society a series of printed documents from the Committee of Experts which in the judgment of the Committee seemed to constitute scientific material of the first importance. These are reports upon the topics of nationality, territorial waters, diplomatic privileges and immunities, responsibility of states for damage done in their territories to the person or property of foreigners, procedure of international conferences, the drafting of treaties, piracy, exploitation of the products of the sea, the legal status of government ships employed in commerce, extradition, and the criminal competence of states in respect of offenses committed outside of their territory. Without in any sense expressing any opinion with reference to the conclusions reached in these various reports, the Committee recognizes their extraordinary value as scientific studies and feels that they should be given a maximum of publicity, and to this end the Committee recommends that the Society, through its President, request the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW to publish such material, and further the Society requests its President, in view of the inadequacy of the funds at the disposal of the JOURNAL, to approach some appropriate agency with the object of obtaining a subvention for the purpose of issuing a special supplement to the JOURNAL.

Further, in order that the membership of the Society may have at its disposal all of the documentary and source material recently appearing upon the general subject of codification, the Committee further makes a recommendation similar to that just made looking toward the publication of a second special supplement embracing the Report of the Committee of the American Institute of International Law, together with the thirty-one projects of conventions drafted by the Committee of the American Institute of International Law for submission to the Pan American Conference of Jurists to be held at Rio de Janeiro in April of 1927.[1]

[1] The second Special Supplement above recommended will be published with a subsequent number of the JOURNAL.

The Committee takes this opportunity of expressing its belief that a sound public sentiment upon the subject of the codification of international law can be developed in no better manner than by having the scientific results of these various bodies placed in the hands of the public of this country, and we believe that as an instrument for the scientific study of international law and its popularization the American Society of International Law may well avail itself of the opportunity to render this public service.

Finally, since the list of topics appropriate for the consideration of the Committee of Experts is by no means exhausted, quite on the contrary it would seem that the work is just beginning, the Committee further requests that the Society authorize it to continue to coöperate in every possible way with the Committee of Experts and to render reports from time to time to the Council upon the progress being made.

RESOLUTION ADOPTED BY THE EXECUTIVE COUNCIL OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, APRIL 24, 1926

*Resolved*, That the reports rendered from time to time to the Executive Council by the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law be transmitted to the Recording Secretary and circulated by him to the members of the Executive Council; that the said reports, together with the replies received from the members of the Council, be submitted to the Executive Committee, and that with the approval of the Executive Committee, after considering the replies from the members of the Executive Council, the said reports may be forwarded to the League of Nations Committee without further action by the Executive Council.

## FIRST SESSION OF THE COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

LEAGUE OF NATIONS, Geneva, *May 22nd, 1925.*

The Secretary-General has the honour to circulate for the information of the Council the following communication, dated May 11th, 1925, addressed to the acting President of the Council by the Chairman of the Committee of Experts for Progressive Codification of International Law:

[Translation.]

*Letter from the Chairman of the Committee of Experts for the Progressive Codification of International Law to the Acting President of the Council*

Upsala, *May 11th, 1925.*

Sir,

I have the honour to inform you in your capacity as President of the Council of the League of Nations that the Committee of Experts for the progressive codification of international law held its first session at Geneva from April 1st to April 8th, 1925, inclusive. You will remember that this Committee was appointed by the Council in accordance with an Assembly Resolution dated September 22nd, 1924, which reads as follows:

> The Assembly,
>
> Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to communications and transit, the simplification of Customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities as well as the recent resolutions concerning legal assistance for the poor:
>
> Desirous of increasing the contribution of the League of Nations to the progressive codification of international law;
>
> Requests the Council:
>
> To convene a Committee of experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilisation and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty;
>
> (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment; and
>
> (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
>
> (3) To report to the Council on the questions which are sufficiently

ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee, after a preliminary discussion on the nature of the work entrusted to it and the manner in which it should be carried out, provisionally selected for consideration a number of subjects relating to international law.

At later meetings there will be prepared in accordance with the decisions of the Assembly and the Council, the provisional list of subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment. This list will then be communicated to the Governments of States, whether Members of the League or not, for their opinion, with a view to the drafting of a final report to the Council by the Committee—after its examination of the replies received.

This final report will enable the Committee to formulate an opinion on the present stage of development of written international law and on how far it will be desirable and realisable in the general field of existing international law to "codify" certain subjects and thereby to add new texts to the rules laid down by Conventions already in force on many important questions.

As will be seen in the preamble, the Committee prepared the attached list of subjects on which reports will be submitted to it at its next session. In indicating these subjects the Committee, of course, did not intend to decide finally the subjects which might be communicated to the various Governments. Its object at that time was merely to make a first and preparatory survey of the field of investigation with a view to proposals which will be worked out in detail later. The Committee appointed sub-committees and rapporteurs from among its members to submit to it the results of their investigations on these subjects before October 15th next.

Questions relating to war and neutrality and questions on private international law were held over for future consideration. As regards private international law, a sub-committee was instructed to submit a list of questions for discussion by the Committee at its next session.

I feel sure that the Council will note with interest the progress made by the Committee in its work, and I shall keep you informed of its subsequent proceedings.

(*Signed*) HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*

## ANNEX

[Translation.]

### LIST OF SUBJECTS FOR STUDY

*Adopted by the Committee on April 6th to 8th, 1925*

The Committee has drawn up the following list of subjects on which reports are to be presented to it at its next session. It is to be understood that

the Committee, in indicating these subjects, has not had the intention of finally determining the subjects which are to be placed before the Governments. The Committee has not at present gone beyond a preliminary examination of the fields to be investigated with a view to later elaboration of detailed proposals.

PUBLIC INTERNATIONAL LAW

(a) The Committee appoints a Sub-Committee to enquire

(1) Whether there are problems arising out of the conflicts of laws regarding nationality, the solution of which by way of conventions could be envisaged without encountering political obstacles;

(2) If so, what these problems are and what solution should be given to them.

(b) The Committee appoints a Sub-Committee to examine whether there are problems connected with the law of the territorial sea, considered in its various aspects, which might find their solution by way of conventions and if so what these problems are and what solutions should be given to them. In particular, the Sub-Committee will enquire into the rights of jurisdiction of a State over foreign commercial ships within its territorial waters or in its ports.

(c) The Committee appoints a Sub-Committee to examine what are the questions concerning diplomatic privileges and immunities which would be suitable for regulation by way of conventions and what provisions on this subject could be recommended.

(d) The Committee appoints a Sub-Committee to enquire into the legal status of Government ships employed in commerce with a view to the solution by way of conventions of the problems raised thereby.

(e) The Committee appoints a Sub-Committee to examine whether there are problems connected with extradition which it would be desirable to regulate by way of general conventions, and, if so, what these problems are and what solutions should be given to them.

(f) The Committee appoints a Sub-Committee to examine:

(1) Whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners;

(2) Whether, and, if so, in what terms it would be possible to contemplate the conclusion of an international convention providing for the ascertainment of the facts which may involve liability on the part of a State and forbidding in such cases recourse to measures of coercion before the means of pacific settlement have been exhausted.

(g) The Committee appoints a Sub-Committee to examine the possibility of formulating rules to be recommended for the procedure of in-

ternational conferences, and the conclusion and drafting of treaties, and what such rules should be.

(h) The Committee appoints a Sub-Committee to examine whether, and to what extent, it would be possible to establish, by an international convention, appropriate provisions to secure the suppression of piracy.

(i) The Committee appoints a Sub-Committee to examine whether, and to what extent, it would be possible to draw up treaty provisions concerning the application in international law of the conception of prescription, whether as establishing or as barring rights, and what such provisions should be.

(j) The Committee appoints a Sub-Committee to enquire with reference, *inter alia*, to the treaties dealing with the subject, whether it is possible to establish, by way of international agreement, rules regarding the exploitation of the products of the sea.

(k) The Committee appoints a Sub-Committee to examine whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories, and, if so, what these principles should be.

The various problems connected with war and neutrality are adjourned for consideration at a later date.

### Private International Law

Examination of the problems which fall within the field of private international law is adjourned to the next session of the Committee. In the interval, a Sub-Committee is appointed to draw up a list of such problems for discussion by the Committee.

### Sub-committees appointed on April 8th, 1925, to report to the committee on the subjects selected by it for consideration

| | | | |
|---|---|---|---|
| *Sub-Committee for Question* | (a) | M. Rundstein. | *Rapporteur.* |
| M. Magalhaes, M. Schücking. | | | |
| *Sub-Committee for Question* | (b) | M. Schücking. | " |
| M. Magalhaes, Mr. Wickersham. | | | |
| *Sub-Committee for Question* | (c) | M. Diena. | " |
| M. Mastny. | | | |
| *Sub-Committee for Question* | (d) | M. Magalhaes. | " |
| Mr. Brierly. | | | |
| *Sub-Committee for Question* | (e) | Mr. Brierly. | " |
| M. de Visscher. | | | |
| *Sub-Committee for Question* | (f) | M. Guerrero. | " |
| M. de Visscher, M. Wang-Chung-Hui. | | | |
| *Sub-Committee for Question* | (g) | M. Mastny. | " |
| M. Rundstein. | | | |

| | | | |
|---|---|---|---|
| *Sub-Committee for Question* M. WANG-CHUNG-HUI. | (h) | M. MATSUDA. | *Rapporteur.* |
| *Sub-Committee for Question* | (i) | M. DE VISSCHER. | (Only member.) |
| *Sub-Committee for Question* | (j) | M. SUAREZ. | (Only member.) |
| *Sub-Committee for Question* M. DE VISSCHER. | (k) | Mr. BRIERLY. | *Rapporteur.* |
| *Sub-Committee Appointed to Draw Up the List of Questions on Private International Law.* M. DE VISSCHER. | | MR. BRIERLY. | " |

## SECOND SESSION OF THE COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

LEAGUE OF NATIONS, Geneva, *January 29th, 1925.*

### LIST OF SUBJECTS TO BE STUDIED IN PREPARATION FOR THE NEXT SESSION

*Adopted by the Committee on January 28th and 29th, 1926*

*Question 1.* Is it possible to establish, by way of a general convention, provisions concerning the communication in criminal matters of judicial and other documents (*actes judiciaires et actes extra-judiciaires*), and concerning commissions to take evidence (*commissions rogatoires*) in criminal matters?

Sub-Committee: MM. SCHÜCKING (*Rapporteur*),
DIENA.

*Question 2.* Is it possible to establish by way of a general convention provisions concerning the legal position of private non-profit-making international associations and private international foundations?

Sub-Committee: MM. DE VISSCHER (*Rapporteur*),
RUNDSTEIN and
WANG-CHUNG-HUI.

*Question 3.* Are there questions concerning the conflict of laws in the matter of domicile of which a solution by way of a convention could be contemplated without encountering political obstacles? In the affirmative, what are these questions and what solutions might be found for them?

Sub-Committee: M. DE MAGALHAES (*Rapporteur*),
Mr. BRIERLY.

*Question 4.* Is it possible to establish by way of a general convention provisions as to the legal position and the functions of consuls, and, if so, to what extent?

Sub-Committee: MM. GUERRERO (*Rapporteur*),
MASTNY.

*Question 5.* Is it possible to reach an international agreement determining, in the absence of special provisions, the effect of the "most favoured nations" clause?

Sub-Committee: Mr. WICKERSHAM (*Rapporteur*),
M. DE MAGALHAES.

*Question 6.* Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative, in what form should this revision be made?

Sub-Committee: MM. GUERRERO (*Rapporteur*),
MASTNY.

| | | | |
|---|---|---|---|
| *Sub-Committee for Question* M. WANG-CHUNG-HUI. | (h) | M. MATSUDA. | *Rapporteur.* |
| *Sub-Committee for Question* | (i) | M. DE VISSCHER. | (Only member.) |
| *Sub-Committee for Question* | (j) | M. SUAREZ. | (Only member.) |
| *Sub-Committee for Question* M. DE VISSCHER. | (k) | Mr. BRIERLY. | *Rapporteur.* |
| *Sub-Committee Appointed to Draw Up the List of Questions on Private International Law.* M. DE VISSCHER. | | MR. BRIERLY. | " |

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RUNDSTEIN and
WANG-CHUNG-HUI.

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M. DE MAGALHAES.

*Question 6.* Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative, in what form should this revision be made?

Sub-Committee: MM. GUERRERO (*Rapporteur*),
MASTNY.

*Question 7.* Is it possible to establish, by way of a convention, international rules concerning the competence of the courts in regard to foreign States, and, particularly, in regard to States engaging in commercial operations (excluding the questions already dealt with in the report sent to the Council of the League of Nations by the Committee of Experts at the Committee's second session)?

Sub-Committee: MM. MATSUDA (*Rapporteur*), DIENA and DE VISSCHER.

*Question 8.* Is it possible, without encountering political or economic obstacles, to formulate by way of a convention international rules concerning the nationality of commercial corporations and the determination of the question to what State the right of affording them diplomatic protection belongs?

Sub-Committee: MM. RUNDSTEIN (*Rapporteur*), GUERRERO and SCHÜCKING.

*Question 9.* Is it possible to establish by way of a convention international rules concerning the recognition of the legal personality of foreign commercial corporations?

Sub-Committee: MM. RUNDSTEIN (*Rapporteur*), GUERRERO and SCHÜCKING.

*Question 10.* Is it possible to establish by way of a convention international rules for the settlement of conflicts of laws concerning contracts for the sale of goods?

Sub-Committee: MM. WANG-CHUNG-HUI (*Rapporteur*), RUNDSTEIN and BOTELLA.

LETTER FROM THE CHAIRMAN OF THE COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS, COMMUNICATING TO THE LATTER, FOR TRANSMISSION TO GOVERNMENTS, THE QUESTIONNAIRES AND REPORTS ADOPTED BY THE COMMITTEE AT ITS SECOND SESSION HELD IN JANUARY 1926.*

[Translation.]

Geneva, *January 30th, 1926.*

In accordance with the Council's resolution of December 8th, 1924, taken in execution of the Assembly's resolution of September 22nd, 1924, and in

* This, and all the other documents that follow, were communicated to the Council, the members of the League and other governments.

virtue of a decision taken by the Committee of Experts for the Progressive Codification of International Law on January 29th, 1926, I have the honour to communicate to you herewith the questionnaires drawn up by the Committee of Experts at its second session, held at Geneva from January 12th to January 29th, 1926.

These questionnaires are as follows:

1. Nationality.
2. Territorial waters.
3. Diplomatic privileges and immunities.
4. Responsibility of States in respect of injury caused in their territory to the person or property of foreigners.
5. Procedure of international conferences and procedure for the conclusion and drafting of treaties.
6. Piracy.
7. Exploitation of the products of the sea.

The present constitutes the first communication contemplated by the Committee's terms of reference, which are as follows:

> (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
>
> (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
>
> (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In accordance with these terms of reference, the Committee will be obliged if you will be so good as to request the various Governments to send to you, for transmission to the Committee, their opinion upon the question whether the regulation by international agreement of the subjects treated, both in their general aspects and as regards the specific points mentioned in the questionnaires, is desirable and realisable in the near future.

When it has received the replies from the Governments, the Committee will examine them and will report to the Council on the questions which appear to be "sufficiently ripe" and on "the procedure which might be followed with a view to preparing eventually for conferences for their solution."

Other provisional lists of subjects may subsequently be submitted to the Governments by the Committee. The Committee, however, expresses the hope that it will be possible for the Governments to give their opinion now upon the subjects comprised in the present communication.

For the purpose of continuing its work, the Committee would be glad if the replies could be received by the Secretariat of the League of Nations before October 15th, 1926. Should a Government consider some of the subjects treated in the questionnaires to be more suitable for immediate consideration than others, the Committee would be happy to receive its replies upon such subjects without delay and in advance of the replies upon the other matters.

The Committee desires to add a general observation regarding various subjects treated in the above questionnaires.

In some of the conclusions proposed to the Committee in the reports of its Sub-Committees, submission of disputes to the jurisdiction of the Permanent Court of International Justice was suggested. It is, of course, to be understood that in any case such suggestions would have constituted merely questions submitted by the Committee for examination by the Governments and, eventually, by such conferences as may be called. Even in this form the Committee has not felt that it should deal with the general question whether a clause providing for the obligatory submission of disputes to the Permanent Court of International Justice, of which examples are to be found in various treaties, would or would not be desirable in the instruments which will fall to be drawn up by the contemplated conferences. That course, moreover, would not prejudice the possibility of obtaining advisory opinions from the Court at the request of the Council of the League of Nations.

The Committee has felt that the above question may always be examined as and when it arises, without being particularly mentioned in the questionnaires.

In addition to the subjects mentioned in the above questionnaires, the Committee examined other matters which are dealt with in the following reports:

Report on extradition;

Report on the criminal competence of States in respect of offences committed outside their territory.

After examination, the Committee decided not to include these matters in the provisional list to be submitted to the Governments; it considers it desirable, however, to communicate the reports to them for their information.

The Committee has presented a special report to the Council of the League of Nations on the question of the legal status of Government ships employed in commerce.

The question of the application in international law of the conception of prescription has been placed with other questions upon the agenda for the next session of the Committee.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts for the Progressive Codification of International Law*

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 1

*adopted by the Committee at its Second Session, held in January 1926*

## NATIONALITY

The Committee has the following terms of reference[1]:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

(1) Whether there are problems arising out of the conflict of laws regarding nationality the solution of which by way of conventions could be envisaged without encountering political obstacles;

(2) If so, what these problems are and what solution should be given to them.

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee, consisting of M. RUNDSTEIN as Rapporteur, M. SCHÜCKING and M. DE MAGALHAES. The report comprises a statement presented by M. Rundstein and approved by M. de Magalhaes (including a preliminary draft of a Convention), a supplementary note by M. Rundstein, observations by M. Schücking and a reply by M. Rundstein, and, finally, the text of the preliminary draft of a Convention as amended by M. Rundstein in consequence of the discussions which took place in the Committee of Experts.

The nature of the general question and of the particular questions involved therein appears from the report and from the conclusions attached to the report in the shape of the amended preliminary draft of a Convention.[2] The Committee is of opinion that Articles 1 to 5 and 7 to 13 of this amended draft indicate the questions to be resolved for the purpose of dealing with the subject by international agreement. All these questions

[1] See Assembly Resolution of September 22nd, 1924.

[2] See page 22.

are subordinate to the larger question set out above. On the other hand, the Committee does not feel that the question raised in Article 6 of the amended draft is among those which can be regarded as at present capable of being treated by way of international regulation.

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the solutions suggested for various particular problems. At the present stage of its work it is not for the Committee to put forward conclusions of this kind. Its sole, or at least its principal, task for the present consists in drawing attention to various questions of international law the regulation of which by international agreement would seem to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but should put forward the proposed questions with sufficient detail to facilitate the decision as to the desirability and possibility of their solution. The necessary details will be found in the final conclusions of M. Rundstein's report—*i. e.*, in the amended text of the preliminary draft of a Convention—excluding always Article 6 of this draft.[1]

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926. (*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

ANNEX

## REPORT OF THE SUB-COMMITTEE

M. RUNDSTEIN, *Rapporteur.*
M. DE MAGALHAES and M. SCHÜCKING.

(1) *Whether there are problems arising out of the conflict of laws regarding nationality the solution of which by way of conventions could be envisaged without encountering political obstacles;*
(2) *If so, what these problems are and what solution should be given to them.*

### I. REPORT SUBMITTED BY M. RUNDSTEIN AND APPROVED BY M. DE MAGALHAES

[*Translation.*]

At its first meeting, held at Geneva, the Committee of Experts for the Progressive Codification of International Law invited the Sub-Committee, of which I had the honour to be appointed Rapporteur, to enquire:

(1) Whether there are problems arising out of the conflict of laws

[1] See page 59.

regarding nationality the solution of which by way of conventions could be envisaged without encountering political obstacles;

(2) If so, what these problems are and what solution should be given to them.

In the list of subjects for enquiry—drawn up and adopted by the Committee of Experts—the possibility of regulating conflict of laws regarding nationality is set down as a problem the solution of which depends on that of another question: namely, whether there are not political obstacles which the solution of such conflicts must necessarily encounter. The reply to be given to this question presupposes the investigation referred to in paragraph (2) above.

There can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States. It is, indeed, the sphere in which the principles of sovereignty find their most definite application; in the present state of international law, questions of nationality are, *in principle*, included among matters expressly reserved for the exclusive jurisdiction of the individual States (see Advisory Opinion of the Permanent Court of International Justice, dated February 7th, 1923: *Collection of Advisory Opinions*, Series B, No. 4). There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to, the jurisdiction referred to above.

This omission is not surprising in view of the nature of the problems connected with the regulation of nationality and the gravity of the general considerations and political interests affecting the whole problem. It cannot even be said that the simple and elementary principle that "each individual must have a definite nationality" is a generally recognised rule of international law, since the lack of any nationality (*Heimatlosat*) has become very frequent and constitutes a serious problem in international life, arising as it does out of conflicts of laws which are often complicated and sometimes inextricable.

But, while maintaining the thesis that questions of nationality belong, *in principle*, to the exclusive jurisdiction of individual States, it is admitted that this thesis is neither inflexible nor self-evident. Questions of nationality are often regulated by international conventions, which proves that the supposed exclusivity of jurisdiction may be abrogated at the will of individual States. We have here a limitation of the principle based on a free decision taken by the parties concerned. Such a limitation is met with in cases where the necessity of regulating nationality questions arises out of changes in the territorial status of countries (treaties of peace, treaties concerning territorial cessions not arising out of a war); it is met with also in cases where the effects of double nationality arising out of the main principles of *jus sanguinis* and of *jus soli* render a solution essential, since they engender situations which are likely to threaten the good relations between

States. Since such conflicts are becoming more and more frequent as a consequence of emigration and re-emigration, the regulation of nationality questions must be undertaken in order to prevent diplomatic disputes and to remove doubts and uncertainties in the personal relations of the citizens of the various countries. There exist even plurilateral treaties which contain stipulations applicable to several States and thus establish a juridical basis for rules which may perhaps in the future come to be generally recognised as customary law (*cf.* Convention of Rio de Janeiro of August 13th, 1906, ratified by the United States on January 28th, 1913, "establishing the status of naturalised citizens who again take up their residence in the country of their origin"). But the fact that it is possible to solve problems of nationality by means of international agreements does not imply that such a solution can be regarded as *jus necessarium*, that is to say that the necessity of solving these problems arises out of imperative provisions of modern international law. Even if the exclusive jurisdiction of individual States which international law recognises in the matter is regarded as a relative conception, dependent upon the development of international relations, it may be asserted that, for the present, those relations have not developed to such an extent as to justify the view that restrictions on sovereignty exist in the matter and that its exercise is controlled by international rules. Individual States *may* therefore regulate nationality problems by means of agreements; if they do so, their exclusive jurisdiction will be restricted in a manner and to an extent dependent upon the provisions of the agreements. But in the present state of international law, it would be premature to say that problems of this nature *must necessarily* be regulated by means of conventions.

The political interests of the various States are too divergent to justify the assertion that an *opinio necessitatis* exists which will create and impose rules for settling all conflicts arising out of the diversity of laws. Still more must unification of legislation, the creation of a single world law in this field, be considered a chimerical undertaking. It is doubtful even whether any purpose would be served by recommending a few general principles to be applied by Governments, either in drawing up their internal laws or in concluding diplomatic conventions (*cf. Year-Book of the Institute of International Law*, Volume V, Oxford Session, pages 56 and 57; Volume XIV, Cambridge Session, pages 66 to 76 and 194 to 200; Volume XV, Venice Session, pages 233 to 271). Even supposing that those principles were adopted in drawing up internal laws or bilateral conventions, conflicts of laws would still inevitably be produced by the divergences which would arise in the interpretation of the uniform laws and by the restricted application of the bilateral conventions.

Taking into account the political nature of the problem and the interests of the individual States, our enquiry must be as to whether there are not problems connected with conflicts between different nationality laws which

might be settled by international regulations applicable to all States. Recent developments in international relations and certain tendencies apparent in the method of settlement of certain conflicts of nationality show that, in practice, a few conceptions have been evolved which are recognised by almost all States and might serve as a basis for future legislation to be enacted in the form of a general convention. It is true that this *jus nasciturum* hardly affects the principal questions; it applies, rather, to secondary problems; for it is obvious that the principal problems involved in such conflicts are not ripe for immediate solution and that the work of codification must proceed slowly, by stages, beginning with the lesser and working up to the more important problems. Wherever there is any sign, however insignificant, of a general agreement on any principle, it is desirable that such agreement should be given a concrete form.

Indications of such agreement as is referred to are to be noted and given definite shape. But, apart from the customary law which is in process of evolution, certain tendencies are becoming apparent—insignificant perhaps, but symptomatic—in connection with questions capable of being solved without encountering political obstacles. In this case we are not dealing with customary law in process of formation, but rather with ideas the development of which should be encouraged as useful for the solution of difficult situations arising out of conflicts between the various national laws. In this connection the work of codification will be creative, while at the same time remaining practical and appropriate to the existing conditions of international life.

For this reason a distinction should be drawn between the two classes of question.

In the *first* class of question, the work of codification will consist in recording the common view which is gradually being formed as to certain secondary problems of conflict of nationality law.

In the *second* class of question, the work will consist in solving certain kinds of conflict for which a uniform solution is already being sought in practice.

It is obvious that, when a problem has a political as well as a legal aspect and the former must prevail over the latter, no action can be taken. It is therefore impossible to effect a uniform regulation of all problems arising out of conflicts of nationality; the work can only be achieved by a process of selection and elimination. No solution can be hoped for where there is the slightest suspicion that the problem is of a political nature.

## I

International law has in practice established for the solution of two categories of conflict of nationality law rules which are almost universally recognised and adopted. These rules may be considered suitable for embodiment in a plurilateral convention.

A.—In cases in which a conflict of nationality arises out of divergencies in laws based respectively on the principles of *jus soli* and of *jus sanguinis*, the law which must be applied, to the exclusion of the other, must depend upon the domicile or mere place of residence of the person whose nationality is in dispute between the two States. That is to say, if a territorial authority claims that its *jus soli* must prevail over the *jus sanguinis* of the other State, the latter cannot claim recognition of its jurisdiction within the territorial limits of the State which applies the criterion of birth. Such jurisdiction is excluded in matters of personal status and in matters of real property: for example, the case of the estates of deceased persons who, according to the laws of their country of origin (*ex jure sanguinis*), are subject to the laws of that country, and, according to the laws of the country of their birth (*ex jure soli*), are subject to the laws of the latter. Any other view would be tantamount to an indefensible infringement of the principle of the independence of States. Therefore it is generally recognised that, in cases of double nationality, the diplomatic protection of the State of which a person is a national in virtue of *jus soli* may not be exercised on behalf of that person on the territory of another State which claims him as its national in virtue of *jus sanguinis;* and, *vice versa*, the diplomatic protection of the country of origin (*ex jure sanguinis*) may not be exercised on the territory of the country of birth of any person whose nationality is there governed by the principle of *jus soli*. Such a recognition of independent divergent solutions for conflicts of laws comes into operation in every case in which there is some bond between the person concerned and the territory in question (such as domicile or residence, situation of a person's estate).

This principle, established by the practice of the chancellories and of diplomacy, is recognised by implication in Article 7 of the Treaty concluded between Spain and the Argentine Republic on September 21st, 1865 (see CALVO, Volume II, page 36; ZEBALLOS, Volume II, pages 49–51 and page 192). It is further implicit in the conventions which provide for the regulation of conflicts arising out of double nationality, for when they recognise restrictions on the sovereignty of the States concerned in regard to nationality questions and, for example, make the principle of *jus soli* applicable only in the third generation, such conventions *ipso facto* assert the principle that the territorial law is alone applicable in all cases where an exemption is not specially provided for. This principle of respect for territorial authority is explicitly laid down in the Swiss Law of June 25th, 1903, on the naturalisation of foreigners and the renunciation of Swiss nationality. Article 6 of this law reads as follows:

> "A person who, in addition to Swiss nationality, possesses that of a foreign State, is not entitled to claim as against that State, so long as he is resident therein, the rights and protection pertaining to the status of Swiss citizen."

It would undoubtedly be useful definitely to lay down this principle, which in practice has often been applied by England and America (see WEISS—Treatise, Volume I, pages 295 and 296). The draft of an international convention on diplomatic protection submitted by the American Institute of International Law to the Director of the Pan-American Union on March 3rd, 1925, embodies this principle of non-intervention in the following provision (Article 7):

> "A diplomatic claim is not admissible when the individual in whose behalf it is presented is at the same time considered a national by the law of the country to which the claim is made, in virtue of circumstances other than those of mere residence in the territory (see Codification of American International Law, Washington, 1925, Pan-American Union, Draft No. 16, page 56)."

This provision applies to all the typical conflicts between *jus soli* and *jus sanguinis*, with the exception of cases where nationality is imposed by the mere fact of residence, which, however, cannot be regarded as conferring a title to nationality; domicile in connection with the principal establishment of a person might justify the presumption that such a person intended to become a national of the country which he had selected as his place of habitual residence; but such a presumption does not exist in cases of mere temporary residence.

B.—Although the provision referred to is based on the principle that each State has the incontestable right fully to apply its nationality law on its own territory, mention must be made of exceptions based on other principles, and particularly on that of *ex-territoriality*.

It would be necessary to provide that the territorial law of nationality shall not apply to children born in a territory where their fathers enjoy privileges and immunities arising out of ex-territoriality, or where they exercise public duties on behalf of a foreign Government (consuls belonging to the regular consular service, officials on a foreign mission, delegates, members of international commissions, etc.).

This principle is embodied in the draft of the Institute of International Law (Article 3, paragraph 3, *Year-Book*, XV). It should be definitely recognised that the children of diplomatic agents and consuls regularly accredited to a foreign Power shall always be regarded as born in the country of their father.

In this case the principle of *jus soli* is set aside both as regards the law of the territory in which the agent exercises his official duties and as regards the law of the country of which he is a national. The personal law of the agent himself is therefore always applicable both in relation to the foreign country and to the agent's own country, even if the latter recognises exclusively the principle of *jus soli* without any reservations in favour of *jus sanguinis*.

This "universality" of personal status is recognised by English law (see

DICEY-KEITH—*A Digest of the Law of England with Reference to the Conflict of Laws*, 1922, page 171: case of a child born of a foreign diplomatic agent on British soil; page 181: case of a child born of a British diplomatic agent on foreign soil. See also the provision of the British Nationality and Status of Aliens Act, 1914–1922, Sect. I, 1.6.iv: "his father was at the time of that person's birth in the service of the Crown").

An explicit reservation abrogating the *jus soli* in the case of the descendants of diplomatic agents is made in the laws of the Argentine, Brazil, Bolivia, Chile and Guatemala. The new Belgian Law on Nationality of May 15th, 1922, assimilates to residence in Belgium residence in a foreign country so long as the father of a minor entitled to option exercises an official function there on behalf of the Belgian Government (Article 8, paragraph 4). Further, the Franco-Belgian Convention of 1891 lays down that the children of diplomatic agents or consuls belonging to the regular consular service shall keep the nationality of their parents unless they lay claim to the benefit of the law of the country in which they were born.

In practice, the French Chancellory recognises without any restriction the principle set forth above, and extends it to the children of all foreigners obliged to reside in France for official reasons even if the father does not enjoy diplomatic privileges and immunities (see VALÉRY—*Manuel de Droit international privé*, 1914, pages 77 and 78). Although no formal text exists (for various draft proposals, see PILLET-NIBOYET—*Manuel de Droit international privé*, 1924, pages 79 and 80), it is nevertheless admitted that *jus soli* must not be applied to the children of persons who enjoy exemption from the territorial law. Such exemption would seem applicable to the children of sovereigns and regular diplomatic agents (holding permanent appointments), extraordinary agents (accredited for special missions—for instance, as representatives of their Governments at international conferences or congresses) and special agents (members of delimitation commissions, commissions of investigation or mixed commissions, agents attending international courts, etc.), including the judges of permanent international courts or of a court set up to settle any special dispute. The same principle should *a fortiori* be applied to the children of agents or officials belonging to international organisations or appointed by such organisations.

Even if the father does not enjoy diplomatic immunities and privileges, it would be fair to apply the principle of ex-territoriality to the children of consuls who are members of a regular consular service, of consular officials and, generally speaking, to the children of all foreign officials who do not possess diplomatic status, if they have taken up their temporary residence in a country enforcing *jus soli* in order to carry out an official mission recognised and permitted by the Government of that country. This rule regarding the children of foreign public officials is not based on recognised rules of international law; the subject would therefore require to be dealt with expressly.

The above principle could not in any case be applied if the parent entitled to privileges was a national of the country in which he exercised his official functions.

If, however, he belongs to the State which has invested him with diplomatic, consular, or, in general, official duties, or if he belongs to a third State, his personal status must prevail over any different provisions of the territorial law.

## II

The problems of the *second* category are those for which national law and international practice furnish solutions capable of reducing or even eliminating conflicts. In this field the customary law has not yet reached the stage of final development and only main outlines are distinguishable: in some cases, however, it may be claimed that there is a recognition of general principles, although the uniformity of the rules applied is not a fact of which the law is explicitly conscious. International codification may here serve to develop ideas which are still only embryonic.

The changes lately introduced in laws as to the nationality of married women, increasing, as they do, the possibility of conflicts, necessitate measures to reduce to the minimum cases of double nationality or of lack of any nationality. Since the new principles naturally tend to become more general, the practical requirements of life necessitate finding some way of preventing conflict.

The enumeration of problems given below follows the usual order and deals with questions relating to:

A.—Acquisition;

B.—Change, loss and resumption of nationality.

A.—1. In regard to acquisition of nationality, it is to be observed in the first place that there are situations in which national law, even though it fully recognises the principle of *jus sanguinis*, sets it aside exceptionally in order to apply *jus soli*, so as to avoid the unfortunate consequences arising out of the lack of nationality of foundlings or of children of unknown parents. If the principle of *jus sanguinis* were strictly applied, (1) foundlings, (2) the children of legally unknown parents (that is to say, whose filiation is not established), (3) children born of parents who are known but whose nationality is unknown or cannot be determined, would possess no nationality whatsoever. The law of some countries solves the problem by applying the principle of *jus soli* to *foundlings* only (paragraph 4, sub-paragraph 2, of the German Law on Nationality of July 22nd, 1913; paragraph 1, sub-paragraph 2, of the Norwegian Law of August 8th, 1924, and of the Swedish Law of May 23rd, 1924, concerning nationality). It would seem more rational to apply this rule to all cases of children born of parents who are unknown or whose nationality is unknown. The treaties concluded, after the World War, between the Principal Allied and Associated Powers and Greece, Po-

land, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes recognise the fact of having been born on the territory of the States mentioned as entitling any person so born to the nationality of those countries if they cannot claim another nationality by birth. A recommendation formerly adopted by the Institute of International Law (*Year-Book*, Volume V, page 57, paragraph 1) has thus been adopted in modern practice.

The adoption of the rule referred to does not, of course, imply that proof to the contrary justifying the application of *jus sanguinis*, would not be admitted. The application of *jus soli* must be regarded as a presumption *juris tantum*. But, until proof to the contrary has been brought, the nationality of children of this category is definitely established (see Convention concluded on June 7th, 1920, between Austria and Czechoslovakia concerning nationality and the protection of minorities, Article 5). The admission of proof to the contrary might, of course, give rise to conflicts if the law of the country where the child was born or found does not admit of the application of the principle of *jus sanguinis*. The rule regarding proof to the contrary could therefore only be applied in countries whose laws recognise the principle of *jus sanguinis*, either purely and simply or in conjunction with the principle of *jus soli*. Countries which adhere to the principle of *jus soli* without any modification or exception would not be inclined to admit proof eliminating the presumption.

I am of opinion that the principle referred to above, applicable to exceptional cases but eliminating the difficulties arising out of lack of nationality, might be recognised as offering a fair solution. In practice such cases would be so rare that such a solution would not be likely to encounter political obstacles. The general principle might be formulated as follows:

> "A child born of parents who are unknown or whose nationality cannot be ascertained acquires the nationality of the State in which it was born or found when it cannot claim another nationality in right of birth, proof of such other nationality being admissible under the law in force at the place where it was found or born."

I think that the above rule might be regarded as universal and as suitable therefore for codification, for on this point the views of the various legislations are unanimous. Thus customary law which is in process of formation might be replaced by a fixed and definite rule. However, it is a moot point whether the formula contained in the treaties concluded between the Principal Allied and Associated Powers and Greece, Poland, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes would not be preferable ("All persons born in . . . territory who are not born nationals of another State shall *ipso facto* become . . . nationals"). (See also Article 2, paragraph 2, and Article 5 of the Polish Law on Nationality of April 9th, 1920.) The formula covers all cases where the nationality of the parents is known but where, according to the law of the parents' country, the child, if it is born

on foreign territory, does not *ipso facto* acquire their nationality (*cf.* Article 1, No. 2, paragraph 1, of the Italian Law on Nationality of June 13th, 1912).

2. In all the other cases of acquisition of nationality *modo originario*, it is doubtful whether uniform rules for the solution of conflicts could be established without encountering political obstacles making the introduction of international instead of national rules impossible. It is true that the legal practice of some countries and some international conventions have devised preventive measures to avoid difficulties arising out of double nationality. One might, for example, put forward the principle of allowing an option for the nationality which would arise from the application of *jus soli*, excluding its operation where it was contrary to the law of the nation of origin (see the system adopted in the Italian Nationality Law of June 13th, 1912, Article 7—Renunciation of the nationality of origin). Or one might recognise a rule permitting repudiation of a nationality acquired by birth in a territory whose law gave persons born there the nationality of the place of birth. In the former event, a law other than that in force in the territory applying the *jus soli*, would be recognised and treated as binding; the law of the territory would thus give way before the principle of *jus sanguinis*, but the effect of the latter would be merely suspensive. In the second event, however, it is the territorial law which would be applied subject to recognition of a resolutory operation of *jus sanguinis* by way of repudiation of the nationality acquired by the fact of birth (*cf.* the Treaty of Amity and Commerce between Belgium and Bolivia of April 18th, 1912, Article 5, paragraph 3). Neither the principle of option nor that of repudiation can be recognised as based on generally accepted rules of international law (see, however, the international treaties quoted by ZEBALLOS, 55–58, and the Treaty between Spain and Portugal of April 21st, 1866). Further, though these principles are recognised by the law of certain countries, it is doubtful whether countries which base their law in these matters wholly on the principle of *jus sanguinis* would agree to exceptions, seeing the incertitude in which their nationals would be placed in regard to their allegiance *pendente conditione*.

On the other hand, countries which have the system of *jus soli* without any exceptions would not be inclined to recognise any limitation of their sovereignty, even such limitation as would be involved in the repudiation of a nationality already acquired. Although there exist agreements between States which have based their legislation on totally different or even contrary principles (Conventions between American Republics recognising exclusively the principle of *jus soli* and some European States which have adopted the opposite system of *jus sanguinis;* ZEBALLOS, Volume II, pages 55 *et seq.*), the system is far from being universal or generally accepted. Further, it is doubtful whether a satisfactory solution could be reached by adopting the principle that nationality acquired *juris sanguinis* is retained only by the second generation and is lost by the third, a right of option, however, being preserved (*cf.* the British Nationality and Status of Aliens Act, 1914 to 1922,

Section I. 1, v. V). The principle mentioned, which is advocated by the Institute of International Law (*Year-Book*, Volume XV, page 271, Article 3 of Resolution) and embodied in a few conventions (Treaty between Germany and Guatemala of September 20th, 1857, Article 10, paragraph 4; Convention on Nationality concluded between Italy and Nicaragua on September 20th, 1917), is far from being generally recognised.

It would certainly be an advantage if the above rules could be generally recognised; it would help to eliminate the difficulties and complications arising out of double nationality, which represents an absolutely abnormal phase in international life and which, according to M. Orlando's apt observation, "creates contradictions the adjustment of which might baffle the most subtle legal brain." But although the difficulties and drawbacks involved in multiple nationality are obvious, it would be premature to say that in present circumstances it would be possible to conclude an international convention with a view to avoiding the unfortunate consequences of such conflicts. The adoption of the principle of option combined with the possibility of repudiation (Recommendations of M. FAUCHILLE. Treatise, Volume I, 1, page 845, Nos. 3 and 4) and the recognition of *jus sanguinis* limited to a certain number of generations (Recommendation of the Institute of International Law) would certainly encounter political obstacles. I do not mean to say that a rule based on these principles would be absolutely impossible, but experience of international practice shows that the object in view would be more easily achieved by means of bilateral conventions which often pronounce for the application of the right of option as an efficient measure to avoid the disadvantages of multiple nationality. It must, however, not be forgotten—as was observed by M. Fusinato and Mr. Westlake during the discussions of the Institute of International Law (*Year-Book*, Volume XV, page 237)—that any proposal put forward with the object of avoiding conflicts of law must end in the drawing-up of a uniform law on nationality. The tendencies governing international practice at the present time, however, would make such a solution impossible. Only a few isolated questions can be taken up with any hope of a solution commanding general approbation.

3. Granting the existence of double nationality which cannot be eliminated by establishing a precise and conclusive general rule, and the dangerous uncertainty involved in certain legal situations, might not a solution be found at least for the following cases? In the event of a dispute as to the nationality of a person of double nationality arising in a State of which he was not a subject, which of the two nationalities should prevail over the other and be recognised as valid for the purpose of the issues in question? We have observed that, in virtue of the principle of the sovereignty and independence of States, the legal position of a person whose nationality is in dispute between two States is settled, as against the other claimant State, by the fact of his being domiciled or residing in one of the two States. The theory put forward by Bluntschli that preference must be given to the State

in which the person concerned has his domicile (see International Law Codified, Article 374)—which was recognised in the Venezuelan arbitral awards of 1903 and 1905, as well as in the Canavaro case settled by the Permanent Court of Arbitration at The Hague in 1912—is not satisfactory, especially where it is a question of conflicts between States which are directly interested in the determination of the nationality of a person whose allegiance is claimed by the two States on equally valid grounds (see also Swiss Consular Regulations of September 16th, 1919, Article 49). On the other hand, in cases in which a third State must decide upon the validity of one of two nationalities, the principle of alternative nationality might be adopted, making the decision dependent upon one only of the two factors determining nationality, namely, that of domicile in one of the two countries, or—in the case of a person who is domiciled in neither of the two countries of which he is a national—the last domicile. We must stress the fact that such a solution, admitting the principle of alternative nationality, could only be applied in relation to third States and cannot be maintained in relation to the two States which claim the allegiance of the person in question; for these States the problem of double nationality hardly exists and the national of a State, even if domiciled on its territory, may not base any claims on that nationality as against another State which claims his allegiance in virtue of its laws. In each of any two States of which a person is a national, his allegiance will always be determined by the laws locally in force. This principle applies in general to all matters relating to his personal status. As Fiore has justly remarked, "it would seem evident that conflicts of laws arising between two States out of the double nationality of one of their subjects must be settled in accordance with the laws of the country in which the person who gives rise to the conflict resides, or of the country in which the disputed property is situated." But outside these two States the principle of domicile would play the principal part.

I consider that the principle adopted in the Japanese Civil Code (Article 8) might, with certain modifications, be recognised as a rule offering a solution for cases of double nationality. Article 8, paragraph 2, of the Japanese Civil Code reads as follows:

> "Any person who at the same time possesses a foreign nationality shall be subject to the laws of the Empire, and any person possessing a double foreign nationality shall be subject to the laws of the country of which he has most recently acquired the nationality."

The second part of this provision should be amended, for if the most recent acquisition of nationality is taken as the criterion, no solution is provided for conflicts arising out of the acquisition of nationality by origin. It would therefore be preferable to recognise as valid the nationality indicated by possession of domicile in one of the countries of which the person is a national, and if he is domiciled in neither of the two countries, the nationality corresponding to his last place of domicile.

B.—1. Before broaching the problems connected with change, loss and resumption of nationality, it should be pointed out that the political obstacles which stand in the way of the solution of these problems would be very difficult to overcome. If we consider in the first place questions relating to naturalisation, it is obvious that each State must be free to enact whatever rules it may think fit concerning the conditions and consequences of the acquisition of its nationality by naturalisation. These rules will not always take into account the provisions of the law to which the person applying for the new nationality is subject and to which he remains subject even after naturalisation. Naturalisation is an act of sovereignty, and any limitation of the powers of a State in such a matter is not to be thought of. There are cases in which a person acquires a new nationality by means of naturalisation without being released from his original nationality by the State of which he was a national, and it also may happen that a person may renounce his nationality in order to acquire another (this is a condition which is often prescribed by the laws of a country of which it is desired to acquire the nationality), but that subsequently the application for naturalisation is definitely refused.

The first case constitutes a typical example of double nationality; the second case is an example of loss of all nationality.

To avoid such difficulties, the recommendations of the Institute of International Law might be adopted (Volume XV—Resolutions adopted at the meeting of September 29th, 1896, Articles 5 and 6); but it is very doubtful whether such solutions would be generally acceptable, seeing that the political interests of a State may require complete liberty of action in matters of naturalisation and may forbid the restriction of its authority implied by making its decisions, in certain circumstances, contingent upon those of another State. The latter State might refuse to release a given person from its allegiance, even if it did not recognise the principle of perpetual and inalienable allegiance. Moreover, the laws of certain countries do not consider that the voluntary acquisition of foreign nationality *ipso facto* involves the loss of the original nationality.

One might ask whether the principle that States should in future grant naturalisation, or even resumption of their nationality, to nationals of another State only if the latter have been explicitly released from all allegiance to that State could not be embodied in a general convention.

This could more easily be achieved by means of bilateral conventions which can take into account the special relations existing between two countries (for instance, the Austro-Serbian Convention of June 16th, 1883, stipulating that the subjects of one of the contracting parties may not acquire the status of citizen in the territory of the other party without previously obtaining permission from the authorities of their own country to renounce their original nationality; see also the agreement between France and Monaco of October 7th, 1919, and the conventions concluded between

Czechoslovakia and Austria, June 7th, 1920, Article 16, and Germany, October 31st, 1922, Article 13).

Nevertheless, there is reason to think that an international agreement might be reached on the point if the recommendations regarding naturalisation were drawn up so as to make their application optional, for instance:

(1) Naturalisation may be granted only on condition that the applicant proves that his country of origin has released him from its allegiance;

(2) But if the country of origin adheres to the principle of perpetual and inalienable allegiance, such proof may be dispensed with; and

(3) Naturalisation may be granted if the applicant can prove that the refusal of the required authorisation was not based on just and reasonable grounds; the fact that the applicant has not fulfilled the requirements of his country in the matter of compulsory military service must always be regarded as a valid ground for refusal;

(4) Acquisition of nationality by naturalisation shall not entitle the State which has granted naturalisation to extend diplomatic protection to the naturalised person as against the State of which he was formerly a national if naturalisation was obtained by reason of the fact that the grounds on which authority to apply for naturalisation was refused were not just or reasonable, or if the country of origin adheres to the principle of perpetual and inalienable allegiance.

It would, on the other hand, be desirable to lay down the rule that release from allegiance owing to naturalisation in a foreign country involves the loss of the original nationality only on the express condition that naturalisation is actually obtained. The application for denationalisation should take effect at the moment at which the new nationality is effectively acquired. The recommendation of the Institute of International Law (Article 6) would not cover all cases which might arise, for it only provides for the case of a person who has fulfilled all the requirements for obtaining naturalisation in another country. If these conditions have been fulfilled, loss of the original nationality may result. But cases might occur in which the conditions for the acquisition of a new nationality have been fulfilled and the request for naturalisation is nevertheless subsequently refused on account of circumstances arising after the applicant has been released from his original allegiance. If, according to the legislation of the original country, it is the actual naturalisation which produces the loss of the original nationality, the danger of loss of all nationality does not really exist. But if the laws of a country provide for the loss of the original nationality in case of naturalisation in a foreign country which insists upon the condition of formal release from the original nationality, such release, once it has been granted, may be the cause of loss of all nationality if the application for naturalisation is subsequently refused in spite of the fact that the required conditions have

been fulfilled or the necessary permission from the original State obtained. For this reason it would be desirable that the principle should be laid down that release from allegiance should only take effect when the process of naturalisation has been definitely concluded. Certificates authorising application for another nationality need not necessarily involve loss of the original nationality. I may quote a very reasonable measure embodied in Polish legislation, which provides for the loss of Polish nationality in the event of naturalisation in a foreign country, but lays down restrictions in regard to persons liable to compulsory military service. In the case of such persons a certificate of release is required, but this release only becomes effective if a new nationality has actually been acquired, and becomes null and void two years after it has been granted; after the expiration of time-limit, which, if necessary, may be prolonged, the release becomes inoperative, and Polish nationality is retained (see Decree of March 21st, 1925, promulgating administrative regulations for the execution of the Law of May 23rd, 1924, on compulsory military service, *Legal Gazette*, 1925, No. 37, pos. 252, paragraphs 534 and 535). This principle should be applied in all cases where the laws of a State require that, before naturalisation in a foreign country, formal authorisation must be obtained, even if the applicants are not liable to compulsory military service. The above rule ("naturalisation shall depend upon the production of proof that the country of the applicant has released him from its allegiance") is therefore to be taken as implying that the release from nationality only comes into operation at the moment when naturalisation has been granted and has actually taken effect.

2. In modern law there is one particular case of change of nationality which might be called a *necessary* change, although it could not properly be called involuntary, namely, change of nationality *by marriage.*

No conflict could arise here if marriage always and everywhere involved loss of the former nationality and the acquisition of a new nationality. But seeing that the law on these matters is based on different systems in different countries and that there is at the present time a very marked tendency to grant married women the right to choose their own nationality, irrespective of the fact of marriage, it is obvious that conflicts must arise which were formerly unknown. The current of modern opinion has had an influence on nationality laws, and the principle that a married woman should have the right to keep or to acquire as she thinks fit (even for children who are in her charge) the nationality she prefers, irrespective of the nationality of her husband, is fully recognised as a unilateral or bilateral rule. That is to say, it is unilaterally laid down that a woman who is a national of the country does not, when marrying a foreigner, lose her original nationality unless she so desires, but the case of the marriage of a foreign woman with a national of the country is not settled in the same sense; or else the general bilateral rule is laid down that marriage does not involve the denationalisation of the woman, without making any distinction between the case of a woman who

is a national marrying a foreigner and that of a foreign woman marrying a national of the country.

Apart from legislations which do not contain any provisions regarding change of nationality through marriage, or which make a change of nationality contingent upon certain special conditions (for instance: domicile, reciprocity), we must distinguish between the two main systems I have described above. As an interesting example, we may quote the provision adopted in Soviet legislation which—in cases of marriage between persons belonging to different nationalities, one of the parties being Russian—makes no distinction between the sexes and lays down the general principle that marriage does not affect nationality but allows a change of nationality to be effected upon a special request submitted by the bride or bridegroom (Article 103 of the Code regarding Civil Status, the Laws of Marriage, Family and Guardianship). The Soviet Law of Nationality of 1924 (Article 5) provides in such a case for simplified naturalisation.

The most recent laws show a marked tendency to abandon the old principle that marriage *ipso facto* involves loss of nationality for the woman (Law of the United States of September 22nd, 1922; Belgian Law of May 15th, 1922, Article 18, requiring a formal declaration; Roumanian Law of February 23rd, 1924, Article 38, providing for the possibility of retaining the original nationality by a provision inserted in the marriage contract or, failing such, in virtue of a special declaration made in proper form before or at the time of marriage). In these circumstances it is not surprising that there is a considerable increase in conflicts of this nature. These would, however, be solved if the uniform principle were established that a woman retains her nationality upon marriage (or in the case of the naturalisation of the husband) unless she explicitly declares that she desires to acquire the nationality of her husband. A provisional draft international convention on the nationality of married women, taking into account modern tendencies in such matters, has been drawn up by the International Woman's Suffrage Alliance (see also the discussions of the *International Law Association* and the able report by Mr. Ernest J. SCHUSTER on "The Effect of Marriage on Nationality": Report of the 32nd Conference, 1924, pages 9–25).

We cannot here analyse in detail all the provisions of this draft, which endeavours to solve the many difficulties arising out of differences of nationality between husband and wife caused either by marriage or by naturalisation. But, although the establishment of a world law on this subject, or the adoption as a basis for internal laws of the general principles embodied in the draft, is very desirable, it cannot be affirmed that the moment for such measures has come. The obstacles in the way of such a solution would seem to be very great, for it is not likely that the States of the Continent of Europe would be inclined to accept, without any limitation, the principle that the marriage of a foreign woman with a national does not involve the loss of her original nationality. Even countries which recognise

the right of a woman who is a national and who marries a foreigner to refuse to acquire the foreign nationality of her husband (unilateral system) might seriously object to the reciprocal application of this principle.

I am of opinion, therefore, that the introduction of the general principles laid down in the above-mentioned draft convention concerning the nationality of married women would now be premature, and can only be contemplated as a later stage in the work of codification. In the work of progressive codification the greatest caution is required, in order not to compromise the possibilities of a general international regulation to which internal laws would be subordinated. For this reason an attempt must be made to prevent or to remove the most acute and harmful conflicts while taking into account the political obstacles which might make even the most modest work of codification impossible. In view of the impossibility—which I suppose to be only temporary—of settling all conflicts regarding the nationality of married women, I am of opinion that, in present circumstances, only *three problems* can form the subject of international regulation.

A

The laws of many countries provide that the marriage with a foreigner of a woman who is a national always involves the loss of the original nationality of the woman, even if the laws of the country to which the husband is subject do not consider that marriage gives the wife *ipso facto* the right to acquire the nationality of her husband. To meet such cases the following rule is necessary: "a woman who marries a foreigner of any given nationality loses her original nationality only if she acquires by marriage the nationality of her husband in virtue of the laws of his country." The adoption of this principle, which is recognised even by the legislation of countries which do not have the rule of denationalisation of a woman through marriage with a foreigner (such as Belgium, Bulgaria, China, Costa Rica, France, Italy, Japan, Mexico, Poland, Portugal, Roumania, San Salvador, Switzerland, the Free City of Danzig) would be an effective means of eliminating the risk of loss of all nationality owing to the differences in the various legislative systems. Such a solution might form a compromise between these systems and smooth the way for a future agreement and a more complete regulation of these questions, while it would meet the views of those who claim that married women should possess independence in matters of nationality. I would therefore propose the following rule:

> "A married woman shall lose her nationality only if at the time of her marriage, or during the marriage, she is considered by the law of the country of which her husband is a national as having acquired the latter's nationality."

This rule would meet the case of naturalisation of the husband after marriage, when such naturalisation did not involve a change of nationality

for the wife, and, in accordance with the law to which the wife was subject before marriage, she is considered to have lost her original nationality although she has not acquired that of her husband. In such cases, the naturalisation of the husband, if it does not affect the wife, will leave the original nationality of the wife unaffected and the hardships inherent in lack of all nationality will be prevented. The rule should be applied in all cases where naturalisation according to the law applicable does not affect the nationality of the wife and where the laws to which the husband and wife were subject before the naturalisation lay down that the naturalisation of the husband *ipso facto* involves the naturalisation of the wife (see the Chinese Law on Nationality of December 13th, 1914, Articles 10 and 15). Since the proposed rule would eliminate disputes arising out of lack of nationality, the question might be considered whether it should not be formulated as a general principle covering also cases of the *acquisition* of nationality through marriage. In cases of conflict between legislations of the bilateral and those of the unilateral type, or with laws of the traditional type (considering marriage as *ipso facto* involving a change in the nationality of the woman), there does not appear to be any means of preventing conflicts arising out of double nationality. The laws of the United States (Cable Act of 1922) do not admit that the marriage of an American woman with a foreigner can involve the loss of her original nationality unless she formally renounces it ("unless she makes a formal renunciation of her citizenship"). An American woman who acquires the nationality of her husband in virtue of the laws of his country does not thereby lose her original nationality. She therefore acquires a double nationality. In order to prevent such conflicts, the proposal has been made to introduce a positive clause modelled upon the provisions of legislations which make loss of nationality dependent on the existence of corresponding provisions in the law to which the foreign husband is subject. Although the negative clause has already been introduced into several legislations, the positive form does not yet exist. Such a clause is discussed in the monograph written by Dr. Gustav Schwartz on the problems of nationality during and after the World War (*Das Recht der Staatsangehörigkeit in Deutschland und im Ausland seit 1914*). He describes it as a "reinsurance" clause (page 202, "Rückversicherungsklausel"). A woman is only to acquire the nationality of her husband if the law to which she was subject before marriage recognises the loss of her original nationality through the fact of marriage. Once it has been decided that the principle of individual nationality shall prevail over the principle that the family constitutes a unit, and this principle has been clearly formulated in negative clauses, it is obvious that a corresponding extension of the existing clause becomes a necessity. Therefore, by a process of generalisation, the following rule might be formulated:

> "In the case of a woman marrying a foreigner, acquisition by her of her husband's nationality and loss of her original nationality shall be con-

ditional respectively upon her being treated by the law of the State to which she belongs as having lost her original nationality and upon her being treated by the law of the State of her husband as having acquired his nationality, whether at the moment of marriage or during the marriage."

(As regards the effect of this rule on possible conflicts of laws, see the observations made below regarding the legitimation of illegitimate children.)

Incidentally, it should be observed that any rule which provides for a difference of nationality between husband and wife must necessarily affect questions of private international law, since it abrogates the unity of the matrimonial status. This problem requires careful examination, seeing that the complications which differences in the respective status of the husband and the wife may create require a clear and definite solution. It is not for us to decide here which of the systems proposed for the solution of the conflicts of private law is the most appropriate. (*Cf.* the system adopted in Argentine and Brazilian legislation making a distinction between the political and civil effects of nationality; see ZEBALLOS, Volume IV, pages 733, 759, 1051 and 1056; the system of ZITELMANN, *Internationales Privatrecht*, Volume II, page 507, providing that the effects of marriage depend for husband and wife upon their individual personal status and, in particular, that the husband cannot exercise any rights in respect of his wife other than those he would possess under the law of his wife's country, pages 749 and 750; the system adopted in the French draft on the reform of Article 3 of the Civil Code concerning the effects of marriage on the personal relations between a husband and wife who are of different nationality (*Revue*, LAPRADELLE, 1924, Volume XIX, page 312). The draft submitted by the International Woman's Suffrage Alliance makes the applicable status dependent upon the decision of the husband and wife, and does not therefore provide any positive solution for cases where husband and wife have not explicitly settled the question. I venture to draw attention to this extremely thorny problem, which is of capital importance.

B

A uniform solution is also required for cases of resumption of nationality by women whose marriage has been dissolved, since it is possible that a resumption of nationality provided for by the law of the woman's original country might not be recognised as involving the loss of her acquired nationality under the law to which she is subject by reason of her marriage. Problems connected with the resumption of nationality by minors or persons who, having obtained naturalisation in a foreign country, subsequently renounce it and resume their original nationality upon again taking up their residence in their country of origin are, on account of political obstacles, not suitable for international regulation; but the situation is different where

widows and divorced women are concerned. In this connection the introduction of a rule that resumption of the original nationality on the dissolution of marriage always *ipso facto* involves the loss of the nationality acquired by marriage would be useful and practicable, and would not encounter political opposition. It is true that the conception of "dissolution of marriage" depends on the provisions of the law on this subject to which the husband and wife are subject. A unilateral regulation of this problem (loss of the nationality acquired by marriage with a national in case of resumption of the original nationality) is embodied in the Roumanian Law regarding nationality of February 23rd, 1924 (Article 40), and is also included in the French bill on nationality passed by the Senate in 1922.

C

Furthermore, the question should be considered whether the proposal contained in the draft of the International Woman's Suffrage Alliance (Clause II—Protection of women without nationality) could not be adopted in cases in which a woman loses all nationality through marriage in consequence of the latter involving the loss of her original nationality without *ipso facto* entitling her to the nationality of her husband. It would be highly desirable that the position of married women to whom the diplomatic and consular protection of the country of which their husbands are nationals is denied should be improved.

The following rule might therefore be suggested:

> "A woman who does not, through marriage, *ipso facto* acquire the nationality of her husband and who, under the law of her country of origin, is considered to have lost her original nationality through marriage, shall nevertheless have the right to a passport and to the diplomatic and consular protection of the State of which her husband is a national."

This rule has already been adopted in consular practice by the Argentine Republic (ZEBALLOS, Volume IV, pages 1055 and 1056).

3. A rule common to many legislations is that the legitimation of a child by a foreigner may, under certain conditions, involve the loss of the minor's nationality. The conflicts to which we have drawn attention when discussing changes of nationality through marriage arise, therefore, in connection with the legitimation of children by foreigners. In such cases a child may be regarded by the law of his country of origin as having lost his nationality, while the law to which the person legitimating or recognising the child is subject may provide that the change in civil status does not affect the nationality of the illegitimate child; consequently, such a child may possess no nationality at all.

In order to remedy this state of affairs, there might be adopted in international law a principle which is already recognised in Belgian law (Law of May 15th, 1922, Article 3), by the Free City of Danzig (Law of May 30th,

1922, paragraph 13) and by legal practice in Switzerland (see SAUSER-HALL, *La Nationalité en droit suisse* 1921, pages 39 and 40), namely, that the legitimated child only loses its nationality in virtue of the change in its civil status if the national law of the father confers upon the child the father's own nationality (it is obvious that if the father possesses no nationality the original nationality of the child is not affected).

The following rule might therefore be suggested:

> "An illegitimate child shall lose its nationality by reason of legitimation only if at the time of the change in its civil status it is considered by the law of the State of which its father is a national as having acquired the latter's nationality."

It has to be considered whether a parallel rule for the case of acquisition of nationality would be accepted. Such rule would apply to the cases in which a national legislation regards legitimation as a title to the acquisition of the father's nationality. A foreign illegitimate child would only acquire the nationality of its father if the law of the State to which the child belonged before legitimation regards legitimation by a foreigner as a special ground of loss of nationality. Such a rule appears reasonable for the purpose of avoiding the effects of double nationality. Including, then, this second principle, the above rule on loss of nationality might be given a general form, viz.:

> "In the case of an illegitimate child of a foreign father, acquisition of the father's nationality and loss of the child's original nationality are conditional respectively on the child's being treated by the law of the State to which it belongs as having lost its original nationality and on the child's being treated by the law of its father's State as having acquired his nationality at the moment of the change in the child's civil status."

This rule might be applied *mutatis mutandis* in cases of recognition of illegitimate children.

It should be pointed out that the above provision is not intended to determine by way of a uniform regulation the effects of legitimation (or recognition) on nationality. It is not intended to create a positive rule, that is to say the contracting States would not be bound to admit that the legitimation of a foreign child by a national involves the acquisition of the State's nationality or, *vice versa*, that legitimation may involve loss of the nationality where a national is legitimated by a foreigner. In view of the divergencies between the laws of various countries on this subject, it is not likely that there is sufficient unanimity of view to permit of the adoption of a uniform rule. The provision suggested merely represents a rule intended to prevent conflicts without affecting the exclusive competence of the legislations concerned. Each State would be free to decide whether it would or would not recognise an effect of legitimation on nationality; but, assuming the recognition of such effect, the scope of the application of any

positive rule would depend on the corresponding provisions of the law of the other State if the latter also recognises the effect of the change in the civil status of the legitimated child.

There are therefore three classes of cases which might be taken into consideration:

(1) The legislation of State A provides that legitimation does not affect the nationality of the child, whereas the legislation of State B recognises the consequences of such a change and acknowledges acquisition of the new and the loss of the original nationality. In cases of conflict between these two legislations, our rule, if applied, would produce the following results: a child of nationality B legitimated by a person possessing nationality A will not acquire nationality A (according to the law of A) and will not be considered by the law of country B as having lost its nationality of origin (in accordance with the proposed rule); a child of nationality A legitimated by a person possessing nationality B will not lose its nationality A (according to the law of A) and will not be considered by the law of B to have acquired a new nationality (according to the rule proposed). It would therefore only be the law of State B which would be affected by the international rule and whose internal rules would be set aside. The provisions of the law of A would remain unaffected.

(2) If State A and State B possess rules as to the effects of legitimation, and if they both provide that legitimation has a positive as well as a negative effect (acquisition and loss of nationality), no conflict will arise; but conflicts are inevitable if the effects of change of nationality vary according to special conditions differing in each country (for instance, State A recognises the effects of legitimation whatever the age of the legitimated child, whereas State B makes the effects of legitimation depend upon whether the child is a minor or not emancipated (*cf.* also the prohibition of legitimation of children born in adultery). The proposed rule would eliminate the difficulties and dangers of double nationality or lack of nationality.

(3) The legislation of State A recognises the positive effects of legitimation (acquisition of nationality) while eliminating its negative effects (legitimation of a child of nationality B by a national of State A involves the acquisition of nationality A but the legitimation of a child which is a national of State A by a foreigner belonging to State B does not involve the loss of the original nationality of the child belonging to State A). The laws of State B, however, recognise simultaneously the positive and negative effects, that is to say, child A legitimated by a national of State B would be considered as having acquired nationality B, but the laws of State A regard it as not having lost its original nationality. The application of the proposed rule would eliminate the possibility of conflict; since the child would not lose its nationality A, it could not acquire nationality B.

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In the foregoing observations I have drawn attention to certain matters which, in present circumstances, would appear to be ripe for codification by means of plurilateral conventions. If this means of reducing conflicts of laws in matters of nationality is adopted, attempts at codification might produce satisfactory results. But, since it is essential to proceed cautiously, a beginning must be made with the less complicated problems which are not likely to arouse the opposition of the States concerned. The results achieved in such a limited field will perhaps appear a little meagre and insignificant, for they will not touch upon the substance of the conflicts in question and will mainly offer solutions for minor difficulties. All beginnings, however, are difficult and it may be hoped that, by thus obviating conflicts of a secondary order, it will ultimately become possible to undertake work on a wider basis with a view to the settlement, without too much friction, of the main problems. Such a codification by stages would be preferable to vaster and more ambitious schemes for the solution of all possible conflicts. The result of attempting too much might be to put in question the very possibility of codification.

The questions which we have indicated as suitable for international regulation would form only a small part of any treaty which might be concluded in the future with a view to obviating conflicts of laws on nationality. Among others, there are some questions of form relative to proof of nationality which are of great practical importance in international relations and urgently require solution in order to improve the position—often a very precarious one—of persons required to furnish certificates constituting official and absolute proof of nationality. The system of registration, which is provided for by the laws of several countries (Belgium and Italy; and *cf.* the idea of a *casier civil* proposed in France), might be generalised by an international agreement; although it would not remove all difficulties, it would to some extent mitigate them. There could be no doubt of the practical importance of such a reform, which would have to be introduced into the internal law of each State. The Grotius Society has very rightly recommended and drafted rules regarding compulsory registration, maintaining that by this means, the uncertainties at present obtaining in international relations would necessarily disappear (see *Transactions of the Grotius Society*, Volume IV, Report of the Committee on Nationality and Registration, page 52: "Registration only fixes nationality with regard to the State which introduces it. Were all States to adopt it, there would be a foundation for an international solution of all difficulties which exist at the present moment, for, with regard to no one would there any longer exist any uncertainty and universal recognition of each other's registers would amount to international agreement and practical uniformity"). This system has been adopted by English law (British Nationality and Status of Aliens Act, 1914–1922, Section I, 1.b. V).

A draft convention between the Austro-Hungarian Succession States

signed at Rome on April 6th, 1922, provides for the establishment of nationality by means of a certificate issued by the competent authorities, at the same time acknowledging the importance of the general principle that the rules governing acquisition or loss of nationality must depend on the law of each State. Article 2 of the draft reads as follows:

> "As between the High Contracting Parties, nationality shall be proved by a certificate issued by the authority competent under the law of the State concerned and countersigned by the authority to which the said authority is responsible. This certificate shall state on what legal basis the claim to the nationality which the certificate is intended to prove rests. Each of the High Contracting Parties shall, however, be entitled, whenever it considers it necessary, to require that the contents of the certificate shall be confirmed by the central authority of the State."

If, finally, satisfactory results are to be obtained by international regulation, it would be necessary to introduce in any convention concluded for this purpose a general clause providing for judicial settlement or compulsory arbitration of disputes between the contracting parties on the questions of nationality which the convention is to settle. The compulsory arbitration clause is becoming more and more frequently adopted in conventions dealing with conflicts of nationality. It is included in the conventions concluded between Austria and Czechoslovakia on June 7th, 1920 (Articles 21 to 30); between Germany and Czechoslovakia on October 31st, 1922 (Articles 14 and 22); between Germany and Denmark on August 10th, 1922 (Article 13); the same procedure is provided for in a draft convention on nationality questions signed at Rome on April 6th, 1922 (Article 4).

Although formerly the generally accepted view was that disputes regarding nationality were explicitly excluded from arbitration (see Arbitration Convention between the Argentine and Italy of September 18th, 1907), this restriction will have to be abolished once questions of nationality are made a matter of international regulation.

In my opinion, the problems referred to above and these two additional proposals would be the only ones suitable for immediate codification. Once this first stage has been reached, regulation on a wider basis might be attempted, for there can be no doubt that practical experience of the effects of international regulation in these matters will furnish valuable hints for the subsequent stages of the work which, as we hope, may be undertaken on a larger scale in the near future.

Two very eminent jurists, WEISS (Treatise I, page 329) and OPPENHEIM (*International Law*, I, page 487), have hoped that the solution of the conflicts with which we are dealing might be obtained by establishing a uniform law embodied in an international convention, or by formulating an international obligation for the States to revise their internal laws on a common

basis, which would serve as a model for the drafting of such laws. This would represent an ideal, the maximum which any international jurist would have the right to contemplate.

I am of opinion, however, that, in order to reach this goal—which would mean the solution of all conflicts—it will be necessary to proceed by stages, for a universal regulation touching upon the substance of the matter would not seem to be compatible with the legal situation at the present day; it would surely be unfortunate if, by attempting tasks which for the moment are beyond us, we were to fail to achieve results which, although modest, would be of great value and, last but not least, practicable.

### Preliminary Draft of a Convention for the Settlement of Certain Conflicts of Laws regarding Nationality

*Article* 1

The High Contracting Parties, while recognising the general principle that acquisition and loss of nationality are governed by the internal legislation of each country, undertake not to afford diplomatic protection to and not to intervene on behalf of their nationals if the latter are simultaneously considered to be its nationals, on grounds other than mere residence in the country, by the law of the State on which the claim would be made.

*Article* 2

A woman who does not acquire through marriage the nationality of her husband and who, at the same time, is regarded by the law of her country of origin as having lost her nationality through marriage, shall nevertheless be entitled to a passport and to the diplomatic protection of the State of which her husband is a national.

*Article* 3

The children of persons who enjoy diplomatic privileges and immunities, of consuls who are members of the regular consular service and, in general, of all persons who exercise official duties in relation to a foreign Government, shall be considered to have been born in the country of which their father is a national. Nevertheless, they shall have the option of claiming the benefit of the law of the country in which they were born, subject to the conditions laid down by the law of their country of origin.

*Article* 4

A child born of parents who are unknown or whose nationality cannot be ascertained acquires the nationality of the State in which it was born or found, when it cannot claim another nationality in right of birth, proof of such other nationality being admissible under the law in force at the place where it was found or born.

*Article* 5

The provisions of Article 4 shall apply where the nationality of the parents is known but the law of the State of which they are nationals does not grant to a child born outside its territory the nationality of its parents.

*Article* 6

Notwithstanding the provisions of Article 1, all persons possessing double nationality shall be regarded by the States the nationality of which they possess as their nationals. In relation to third States the nationality of such persons shall be determined by the law in force in their place of domicile, if they are domiciled in one of the two countries of which they are nationals.

If such persons are not domiciled in either of these two countries, their nationality shall be determined in accordance with the law in force in that one of the two States in which they were last domiciled.

*Article* 7

The Contracting Parties undertake to grant naturalisation only on condition that the applicant is released from his allegiance to his country of origin.

Naturalisation may nevertheless be granted if the State of origin of the applicant adheres to the principle of perpetual and inalienable allegiance, or if the applicant proves that he has been refused expatriation without just and reasonable cause.

Naturalisation acquired under the conditions laid down in paragraph 2 does not entitle the State which has granted such naturalisation to afford diplomatic protection to or to intervene on behalf of the person naturalised as against the State of which the naturalised person was formerly a national.

*Article* 8

A release from allegiance (permit of expatriation) shall produce loss of the original nationality only at the moment when naturalisation is actually obtained in one of the Contracting States. Such release shall become null and void if the naturalisation is not actually granted.

*Article* 9

A woman married to a foreigner who by the dissolution of her marriage (death of husband, annulment of the marriage, divorce) recovers her original nationality shall by the fact of such resumption of nationality lose the nationality she acquired by marriage.

*Article* 10

In the case of a woman marrying a foreigner, acquisition by her of her husband's nationality and loss of her original nationality shall be conditional respectively upon her being treated by the law of the State to which she

belongs as having lost her original nationality and upon her being treated by the law of the State of her husband as having acquired his nationality, whether at the moment of marriage or during the marriage.

*Article* 11

In the case of an illegitimate child of a foreign father, acquisition of the father's nationality and loss of the child's original nationality are conditional respectively on the child's being treated by the law of the State to which it belongs as having lost its original nationality and on the child's being treated by the law of its father's State as having acquired his nationality at the moment of the change in the child's civil status.

*Article* 12

As between the Contracting Parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the authority of the State. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The Contracting Parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality.

*Article* 13

Failing a direct agreement between the Contracting States, any disputes which arise between them regarding the application or interpretation of the present Convention shall be brought before the Permanent Court of International Justice unless, in virtue of a special convention or a general arbitration clause, the dispute is settled either by a procedure of conciliation or arbitration or by some other means.

The Contracting Parties agree that each Party shall be entitled to refuse to have the questions referred to in the present Convention submitted to a procedure of conciliation or arbitration before the competent national jurisdiction has given its final decision, except always in cases of denial of justice.

*Article* 14

The provisions of the present Convention shall not in any way affect those of treaties, conventions or agreements in force regarding questions of nationality which have been concluded by the Contracting States before the date at which the present Convention comes into force.

*Article* 15

The present Convention shall apply only to the nationals of a Contracting State.

*Article* 16

The Contracting States do not undertake in virtue of the present Convention to apply any laws other than those of one of the Contracting States.

*Article* 17

Clauses providing for ratification and accession.

Clauses as to the duration, renewal and denunciation of the Convention.

Warsaw, October 8th, 1925.

(*Signed*) S. RUNDSTEIN.

II. SUPPLEMENTARY NOTE BY M. RUNDSTEIN

[*Translation.*]

Some further observations, complementary to those I have already had the honour to submit on behalf of Sub-Committee A, are called for, in view of the fact that the International Law Association has prepared a detailed draft regarding the uniform regulation of questions of nationality, which was adopted by the Thirty-third Conference held at Stockholm in 1924 (Report of the Thirty-third Conference, Report of the Committee on Nationality and Naturalisation, pp. 22–72).

In analysing the Association's suggestions, it should be observed in the first place that the solution proposed by the Association cannot be considered a rational one. The recommendation of two modes of procedure for the purpose of avoiding conflicts, *i.e.*, either that of embodying the relevant clauses in national legislation or of concluding a special convention regarding questions of conflicts properly so called, would not bring us nearer to our goal. The proposal of a "model Statute" would involve far-reaching reforms of domestic legislation; it would be tantamount to a fundamental revision of laws which in many countries are regarded as rules of a constitutional nature. The more so since the "model Statute" is based on the universal recognition of *jus soli* as a general principle modified by optional provisions designed to facilitate the application of *jus sanguinis*. Such a solution, consisting in the establishment of a single test of nationality, would have little chance of general acceptance. What we are endeavouring to do is not to create uniform "qualifications" for the whole world; that would be a goal beyond our reach under present circumstances. The task of codification is a more modest and, I venture to assert, a more fruitful one, since the solution of conflicts that at first sight seem insignificant but that weigh heavily on the normal functions of international life is more important than the recommendation of uniform rules which under modern conditions it would be almost impossible to apply. It is doubtful, moreover, whether such rules would really be uniform; the fact that a rule is identical in several legislations does not imply that its practical application and the interpretation given to it by the courts and by juridical acts in administrative law would always be the same in the different countries. Further, it is difficult to conceive the normal operation of a uniform legislation unless a universal jurisdiction were created at the same time—that is to say, an international

court with compulsory jurisdiction. This would be an essential condition, since without a common jurisprudence the uniform law in force in each country which had accepted the "model Statute" would be subject to the well-known influence of legal and administrative practice. Uniformity would therefore in point of fact be very problematical.

Nor can it be said that the recommendations contained in the "model Statute" would not require a fundamental revision of domestic legislations. On the contrary, it would be impossible to accept these recommendations without setting up new principles which could not be introduced into legal systems recognising the principle of *jus sanguinis*. Clause 1 of the "model Statute" ("nationality acquired on birth") favours the ingenious system embodied in the legislation of Great Britain; it adopts the admirable solution introduced into this legislation as a compromise between the two opposed principles of *jus soli* and *jus sanguinis*. But it differs from it in its conception of subsequent option which in English law requires a formal declaration regarding re-acquisition of the original nationality, whereas Clause 1 regards option as a repudiation of the nationality acquired in virtue of *jus soli*.

Could the system embodied in the English Law of July 4th, 1922, modifying the limitations recognised by the "Principal Act" of August 7th, 1914, regarding the extension of *jus sanguinis* and introducing the new principle of formal and compulsory declarations by the father and by the child, possibly be recognised as a universal solution?

I consider that the question of conflicts arising out of two opposite systems is not suitable for uniform regulation. It belongs rather to the province of bilateral conventions which take special and sometimes contradictory interests (emigration, military service, etc.) into account; such questions should be settled by means of a compromise where the contracting parties abandon the principles generally applied in their domestic legislation in order to obtain concrete and definite results by means of mutual concessions. The acceptance of Clause 1 would involve the introduction of reforms modifying the very structure of the laws on nationality in order to substitute, for instance, for the system of pure *jus sanguinis* the special provisions of English law (inscription in the register and subsequent option) modified by Clause 1, which is in favour of the adoption of *jus soli*. Doubtless such a new system embodying a general idea might be regarded as an effective means of preventing numerous and regrettable conflicts. But even if we accept the maxim that "general ideas are generous ideas", we must nevertheless bear in mind the obstacles in the way of the realisation of principles which, in theory, are rational.

Further, it would be difficult to maintain that the system proposed in Clause 2 of the "model Statute" regarding the legal effect of *legitimation* would be acceptable. A general statement that legitimation would produce its effect only if the illegitimate child possessed no other definite nationality would not be in conformity with the system accepted by most modern

legislation. We may perhaps see here the influence of English law, which does not recognise legitimation *per subsequens matrimonium* and which in this particular differs from Scotch and North American law (see KUHN, *Principles of Anglo-American Law*, 1924, p. 183; DICEY-KEITH, pp. 522 and 849). I do not see the necessity of introducing a fundamental rule providing for the exclusion of one of the means by which nationality may be acquired. The codification of legal rules regarding nationality cannot, even by way of recommendation, provide a uniform basis to which individual legislations would have to conform; its principal task should be to endeavour to find solutions for conflicts. If any given country recognises the effect of legitimation on nationality, and the laws of another country contain no provisions regarding this matter, or even give a negative solution to the question, the remedy must not be sought in the reform of the divergent laws—for I do not see the necessity of substituting for a system which is regarded by State A as rational a different system adopted by State B, which is not based on the legal traditions and interpretations generally recognised by State A. We do not say that the effects of legitimation must conform to a preconceived system; rather, while recognising the *existence* of divergence, we endeavour to solve the questions of acquisition or loss of nationality in such a way that the differences between individual legislations shall not involve the consequences of double nationality or statelessness. The acceptance of rules which are subject to the relevant laws in force in the various countries does not in any way affect these laws themselves. These rules may restrict their general effect and make the acquisition or loss of nationality dependent upon the previous solution of another question regarding the effect of a definite rule—that is to say, nationality may be acquired in virtue of legitimation *provided* such acquisition involves loss of the original nationality. In such a case, domestic law is subordinated to a rule embodied in a foreign law, but the principle of acquisition itself remains intact. For this reason, the solutions suggested in the report of our Sub-Committee in regard to legitimation would be preferable to a uniform regulation which would require a general remodelling of the laws in force and would constitute an attempt at introducing a principle restricting the possibilities generally recognised by the majority of legislations and even recommended in new draft laws (*cf.* the draft of the French law on nationality voted by the Senate, which puts an end to the controversy regarding the effect of legitimation on the nationality of illegitimate children).

Clause 2 ignores the question of the recognition of illegitimate children, which does not exist in English law, and which, as regards its effect on nationality, is of great importance in Belgian, French, Polish and Swiss legislation.

With reference to the question of the effect of marriage on nationality (Clause 3), it should be noted that, generally speaking, the preceding observations apply equally to the rules concerning this matter contained in

the draft. These rules, providing for the possibility of declining the nationality acquired by marriage, are unacceptable. I refer to the considerations put forward in our Sub-Committee's report, and I am happy to see our point of view confirmed by an opinion given by President Hammarskjöld, who, in his report to the Conference of the International Law Association at Stockholm, laid stress on the fact that, "under present conditions, a reform which would deprive marriage of its automatic effect on the nationality of the wife would have very little chance of being universally accepted" (Report, p. 41). Clause 3 could only be regarded as intended to settle possible conflicts between different legislations; in this respect, it is in conformity with our Sub-Committee's proposal. But inasmuch as it lays down a fundamental rule to the effect that a married woman is entitled to keep her original nationality subject to a registered declaration, this clause necessarily involves a modification of principles which would meet with considerable difficulties. It would therefore be preferable to regard the suggestion under consideration as applicable exclusively to the settlement of conflicts. In this case the alternative provided for in Clause 3*b in fine* (*cf.* final draft, Report, p. 50) would be superfluous (. . . "or unless she makes a formal declaration to be recorded on the register of marriage to the effect that she wishes to retain her former nationality"). For *if* the national law makes a special reservation as to the effect of such a declaration, or if the option is contemplated of declining nationality, in which case the original nationality would remain intact ("a formal denunciation" in American law), the application of a rule on the suspension of the effects embodied in the law to which the husband is subject would prevent possible conflicts. But I do not see the necessity for laying down that all legislations must adopt the principle of separate nationality in virtue of a formal declaration by the wife. Moreover, it must be borne in mind that many legislations recognise the principle of formal renunciation of the original nationality or even adopt the strict principle that marriage has no effect whatever on nationality. Accordingly, neither a declaration by the wife nor renunciation by her are of importance for the settlement of the problem.

Clause 4 (conditions as to naturalisation) I consider superfluous; in so far as it introduces the rule of collective naturalisation in virtue of family ties, it runs counter to the principles recognised by many legislations, which allow of exceptions to this rule or provide for the possibility of reservations (conditions imposed by the act of naturalisation itself, option of subsequent repudiation, *cf.*, for instance, the English Law 1914–1922, Part II, Section 5). Moreover, the right granted to a child born in foreign territory to reacquire by subsequent option its original nationality is erroneously regarded as "naturalisation"—the child is not obliged to observe the conditions regarding domicile or residence. This so-called naturalisation is nothing but an option, the conditions of which are governed by Clause 1.

Finally, Clause 5 (conditions as to loss of nationality) would be incompati-

ble with legislations which provide for the acquisition of nationality by means other than naturalisation, marriage or legitimisation (limited exclusively to children without nationality), such as recognition, adoption, re-acquisition of her original nationality by a divorced woman, etc. In accordance with the above-mentioned rule, persons acquiring a new nationality in virtue of reasons other than those therein enumerated would not be considered as having lost their former nationality.

The draft submitted by the Association, which proposes to regulate the questions referred to in Clauses 1 to 5 by means of a "model Statute," recommends, in addition, the separate regulation of certain questions by means of international conventions. The recommendations deal with: (1) the problem of double nationality and statelessness; (2) the change of nationality of married women, and (3) expatriation.

1. The recommendations of the Association agree with the draft submitted by our Sub-Committee in so far as the regulations on double nationality are concerned. But I prefer the wording adopted in our preliminary draft and modelled on the proposal of the American Institute for International Law. The Association's recommendations do not deal with the consequences involved in the imposition of nationality by the simple fact of residence; no attention is paid to declaration of intention as a decisive factor in acquisition of nationality (*cf.* Article 9 of the Draft Code of Private International Law by M. Bustamante y Sirvén; also Article 2 of the Portuguese Decree of December 2nd, 1910, on naturalisation: "Any Portuguese citizen who for any reason is regarded as a national of another country may not, so long as he resides in that country, claim the status of a Portuguese citizen"). The criterion which it is suggested should be applied in the case of a person possessing double nationality residing in a third State is also inadequate. The documents produced by such a person (passport, certificate of origin, etc.) are not conclusive. They might be regarded as a presumption in support of the proof required by the third State, but I think it would be preferable to retain domicile as a criterion and as a basis for the application of the relevant law (Article 10 of the Bustamante draft).

As regards persons without nationality, the Association's recommendation would seem contradictory; on the one hand, such persons are regarded as possessing their former nationality, but at the same time they are not recognised the right to lay claim to the privileges accorded by treaties concluded between the country in which they are residing and the country of which they were formerly nationals. It would seem, therefore, that this provision would be of very limited value; it would affect conflicts arising under private international law and might be referred to in cases in which a State of which a stateless person was formerly a national refused to re-admit its former citizen who had been expelled by the foreign country in which he was domiciled.

2. The rule proposed in regard to the right to a change of nationality of

women judicially separated from their husbands is not suitable for a convention on nationality applying to questions of public international law. This question is a problem belonging rather to the province of the legal capacity of married women; taking into account the rigidity of territorial laws, it is doubtful whether a rule of such far-reaching effect could be universally accepted. The Ferrari case settled by the French Cour de Cassation in 1922 (DALLOZ, 1922, I. 329, *Revue Lapradelle*, 1922–23, p. 444, and Note by PILLET, p. 461) shows that it would not be easy to subordinate the exclusive competence of territorial laws to the requirements of uniform regulation. French jurisprudence is of opinion that the acquisition of French nationality must be governed by territorial legislation, even when applied to foreigners (Articles 12, 14, 15 of the Bustamante draft). In the case of the re-admittance to her original nationality of a foreign woman who was originally a French national, the French Courts ignore the provisions of foreign law on the legal incapacity of the woman and marital authorisation (see PILLET-NIBOYET, p. 188). It is therefore not likely that a law which takes into consideration only the case of the death of the husband or divorce would be ready to admit that judicial separation, which does not dissolve the marriage tie, had an analogous effect. The divergency between the various legislations in regard to the effect of judicial separation is a sufficient reason for abandoning any attempt at a uniform settlement of conflicts of this nature.

3. Generally speaking, the recommendations concerning conflicts arising out of expatriation should be approved; they are in conformity with the resolution adopted by the Institute of International Law in 1896 (Articles 5 and 6), but it should be noted that questions concerning the forfeiture of a naturalisation already acquired, even when they exclusively concern cases of fraudulent naturalisation, are not yet ripe for settlement of any kind. This question, which has become acute owing to the events of the world war (except in the United States of America, where forfeiture of naturalisation was settled by the Law of June 29th, 1906, and in Great Britain, Section 7 of the Law of August 7th, 1914), has given rise to innumerable difficulties and has increased the number of persons possessing no nationality. In order to mitigate the unfortunate consequences of such a state of affairs, a rule was proposed to the effect that persons losing their nationality through forfeiture automatically resume their former nationality ("naturalisation obtained by fraud should be capable of cancellation, and upon this happening the individual concerned should revert to his former national status"). But could a State be compelled to re-admit a former national who had acquired a new nationality by means of naturalisation and whose naturalisation had been forfeited without taking into account the time which had elapsed between naturalisation and denationalisation, and introduce the principle of compulsory re-assumption of the original nationality without previously considering the questions of fact and of law involved? That would certainly

be going too far, and I consider that an impartial consideration of the question would suggest the rejection of such a solution.

Warsaw, December 2nd, 1925.

(*Signed*) S. RUNDSTEIN.

### III. M. SCHÜCKING'S OBSERVATIONS REGARDING M. RUNDSTEIN'S REPORT ON NATIONALITY

[*Translation.*]

The undersigned is in agreement with the proposals contained in M. Rundstein's report, both with the negative part of the report and of the supplementary note—since certain questions have not yet reached a stage at which they can be settled—and with the positive proposals for the solution of certain other questions. I also entirely approve the informal proposals put forward in the preliminary draft in regard to those problems which can be solved by a Convention. I would merely venture to offer a few personal remarks on the following points:

1. Article 2 of the preliminary draft might be given too wide an interpretation as regards the rights of a woman who has not acquired foreign nationality on marrying a foreigner but is regarded by her country of origin as having lost her former nationality. It might be thought that the intention of this article was to give to a woman thus situated unlimited passport-rights, whereas obviously the sole intention is to place her on the same footing as her husband as regards the issuing of a passport by the State of which her husband is a national. In order to avoid confusion, therefore, it would be desirable to insert in Article 2 a short phrase such as "on the same footing as her husband."

2. Under Article 7 of the proposed Convention, naturalisation may be granted to the national of another State when such national has been refused expatriation by his State of origin "without just and reasonable cause." I entirely approve this principle, but the clause should not be interpreted in the light of the French text, page 7, paragraph 4, numbered section 3, in which it is stated that refusal of permission to emigrate on the ground that military service has still to be performed must always be regarded as "valid ground for refusal." I think there may be circumstances which give an individual a natural right to divest himself of his nationality of origin even when he has not fulfilled his military obligations. I would quote the following facts in support of my opinion.

The fact that refusal to perform military service has never ceased to be classed among those offences for which extradition is not allowable is no doubt due to the feeling that, in regard to this matter, there does not exist the legal necessity for civilised States to act together which, during the 19th century, produced the continuous extension of the principle of extradition. To-day, when certain States are obliged to abolish universal military

service, civilised States have less than ever a common interest in securing that the subject of a neighbouring State shall always fulfil his military obligations. The existence of such a common interest could only be recognised at the moment when, as I hope will ultimately be the case, all the various national armies have been replaced by detachments of a single federal army dependent on the League of Nations; unhappily we have not yet reached this point. Moreover, it should not be forgotten that the whole conception of compulsory military service is passing through a crisis. Now that we are beginning to regard war as no longer constituting a legitimate procedure under international law, but as a crime, we must naturally regard compulsory military service in a quite different light from formerly. We observe in various countries a movement of refusal to take part in war, and several States which still adhere to the principle of compulsory universal military service have already taken this movement into account in their legislation. If, therefore, legislators—as is the case in a few States—dispense from service in wartime persons who have conscientious objections, does this not furnish proof that the universal duty to serve in the military forces is already considerably losing ground? It would seem quite unnecessary to force military service on nationals who might later on be freed from it in wartime. But in my opinion the following consideration is decisive. It cannot be denied that recent alterations in the map of Europe have included millions of persons in States which are new to them; and they can hardly be said to have been included in these new States at their own desire. Therefore the international pacification which all reasonable men desire, and for which we jurists must legally prepare the way, would be greatly advanced if the right of self-determination were first of all recognised in the form of the right of individuals freely to determine their own status, *i.e.*, persons who are ill at ease in the State to which they have been allotted, would be granted the fullest facilities for becoming nationals of another State of their own language and nationality. This principle would involve the granting of denaturalisation on extremely liberal lines and such denaturalisation could not be refused merely for failure to fulfil military obligations. Even if the contrary be the case, I do not consider that any other State would have a good reason for refusing naturalisation to an individual. *Cf.*, in this connection Von Bar, Vol. I, *Theorie und Praxis des internationalen Privatrechts*, pp. 197 *et seq.* *Ibid.*, for bibliography and practice.

3. The settlement of the problem of nationality by the national law alone has hitherto, in the case of a woman marrying a foreigner, been considerably hampered by the fact that this problem, in accordance with the principles of private international law, has a direct effect on the private law aspects of the institution of marriage. It has often been argued that in the domain of private law the unity of the institution of marriage must be maintained. *Cf.*, for instance, Asser, *Das Internationale Privatrecht, Einleitfaden*, page 61; Von Bar, *op. cit.*, Volume I, pp. 439, 480, 501, *et seq.* *Cf.* also, as re-

gards the unity of the institution in private law, PILLET, *Traité pratique du Droit international privé*, Paris, 1923, Volume I, page 558.

Under these circumstances, it might perhaps be desirable to insert in Article 9 and the following Articles a formal phrase to the effect that the rules laid down under the International Convention should not in any way affect the private law relations between husband and wife.

(*Signed*) WALTER SCHÜCKING.

### IV. M. RUNDSTEIN'S REMARKS ON M. SCHÜCKING'S OBSERVATIONS

[*Translation.*]

1. M. Schücking considers that Article 2 of the preliminary draft should be so drawn up as to eliminate all doubt concerning the right of the married woman to obtain a passport and the diplomatic protection of the State of which her husband is a national. He thinks it important to state that the nature of this right depends on the legal status of the husband himself. The question is thus one of rendering the rights of wife and husband equal. Therefore the words "on the same footing as her husband" should be added at the end of the article.

I agree that it would be desirable to insert this expression, as the rights of the wife derive from those of the husband.

2. As regards paragraph 2 of Article 7 of the preliminary draft, M. Schücking raises objections to the arguments put forward in the report (page 7). He takes the view that a request for naturalisation should not be refused on the ground that the person making the request has not fulfilled his military obligations. There are circumstances in which, in the conflict between the right of expatriation and obligations arising under military service, emigration should be allowed despite the requirements of allegiance. If there is no obligation to extradite persons who fail to fulfil the obligations of the military laws, there is equally no need to lay down that the legal consequences of such failure should be recognised internationally. The fact should also be taken into account that certain States have been obliged to abolish compulsory military service. Our generation hopes to attain general disarmament and regards war, not as a legitimate procedure, but as a crime. It therefore views compulsory military service in an altogether different light. Finally, the right of individuals to decide their own status should be recognised in view of the political changes brought about by the World War. Persons who are ill at ease in a State of which they have become nationals as a result of the cession of territory should be given an opportunity to emigrate; the right of emigration and consequently of changing their nationality should be definitely reserved.

With regard to these objections, it should be pointed out that Article 7, paragraph 2, of our preliminary draft does not mention the non-fulfilment of military duties as a just ground for the refusal of naturalisation. It is true

that we referred to this matter in the arguments put forward but that was only to demonstrate the serious nature of the conflicts which might arise through the relationship of military service to the problem of nationality. Article 7, paragraph 2, as drafted, leaves each State sufficiently free to decide as to the reasons for refusal to allow expatriation; but, in the case of such refusal, naturalisation, while still remaining valid, does not include the right to diplomatic protection. This is the only way to obtain agreement between States, which are very susceptible as regards their competence in matters generally dealt with exclusively under their domestic legislation. It would certainly be desirable to lay down a general rule recognising absolute freedom in the matter of expatriation irrespective of domestic provisions concerning military service. But the States concerned would regard such a decision as trespassing on their sovereign rights. The settlement of such questions depends on political circumstances, and the contrary argument that a clause inserted in a convention regarding conflicts of nationality laws could change political conditions cannot be maintained. I do not affirm that these conditions are all they might be or that they do not call for reform —even radical reform. General disarmament is an ideal which merits all our enthusiasm, but it cannot be attained through the reform of nationality law. Such reform may be the direct consequence of disarmament, when disarmament has been attained, or perhaps of the establishment of guarantees against the danger of war.

3. M. Schücking observes that it would be desirable to add to Article 9 and the following articles an express provision to the effect that the rules laid down in these articles do not in any way affect the settlement of questions of private law. As the problem of nationality is of fundamental importance from the point of view of the application of the proper law in personal relations between husband and wife, and in regard to their matrimonial status, it should be noted that the solutions proposed in the preliminary draft do not affect the settlement of conflicts of private international law.

It must be clearly understood that it was never our intention to touch on questions of private international law. To mention this fact expressly in the text of a convention may, perhaps, be superfluous. The suggested clause might, however, be worded as follows, and we would apply the same formula to recognition and legitimation of illegitimate children:

> "The provisions of Articles 9, 10 and 11 of the present Convention do not refer to the solution of conflicts of civil law, which shall continue to be subject to the internal law in force in the Contracting States or to international conventions on the subject."

Warsaw, January 3rd, 1926. (*Signed*) S. RUNDSTEIN.

## V. PRELIMINARY DRAFT OF A CONVENTION

*Amended by M. Rundstein as the Result of the Discussion in the Committee of Experts*

[*Translation.*]

*Article* 1

The High Contracting Parties undertake not to afford diplomatic protection to and not to intervene on behalf of their nationals if the latter are simultaneously considered as its nationals from the moment of their birth by the law of the State on which the claim would be made.

*Article* 2

The children of persons who enjoy diplomatic privileges and immunities, of consuls who are members of the regular consular service, and, in general, of all persons who exercise official duties in relation to a foreign Government shall be considered to have been born in the country of which their father is a national. Nevertheless, they shall have the option of claiming the benefit of the law of the country in which they were born, subject to the conditions laid down by the law of their country of origin.

*Article* 3

A child born of parents who are unknown or whose nationality cannot be ascertained acquires the nationality of the State in which it was born or found when it cannot claim another nationality in right of birth, proof of such other nationality being admissible under the law in force at the place where it was found or born.

*Article* 4

A child born outside the State of which its parents are nationals has the nationality of the State where it was born if the State of origin does not give the parent's nationality to such child.

*Article* 5

A person possessing two nationalities may be regarded as its national by each of the States whose nationality he has. In relation to third States, his nationality is to be determined by the law in force at his place of domicile if he is domiciled in one of his two countries.

If he is not domiciled in either of his two countries, his nationality is determined in accordance with the law in force in that one of these two States in which he was last domiciled.

*Article* 6

Naturalisation may not be conferred upon a foreigner without his having shown the will to be naturalised or at least without his being allowed to refuse naturalisation.

Naturalisation acquired without the applicant being released from his allegiance by the State of origin does not give to the State according such naturalisation the right to give diplomatic protection to, and to intervene on behalf of, the person naturalised as against the State whose subject he originally was.

*Article* 7

A release from allegiance (permit of expatriation) shall produce loss of the original nationality only at the moment when naturalisation is actually obtained in one of the Contracting States. Such release shall become null and void if the naturalisation is not actually granted within a period to be determined.

*Article* 8

A woman who has married a foreigner and who recovers her nationality of origin after the dissolution of her marriage loses through such recovery of the original nationality the nationality which she acquired by marriage.

*Article* 9

A married woman loses her original nationality in virtue of marriage only if at the moment of marriage she is regarded by the law of the State to which her husband belongs as having acquired the latter's nationality.

Where a change in the husband's nationality occurs during the marriage the wife loses her husband's nationality only if the law of the State whose subject her husband has become regards her as having acquired the latter's nationality.

*Article* 10

A woman who does not acquire through marriage the nationality of her husband and who, at the same time, is regarded by the law of her country of origin as having lost her nationality through marriage, shall nevertheless be entitled to a passport from the State of which her husband is a national on the same footing as her husband.

*Article* 11

An illegitimate child does not lose its nationality of origin in consequence of the change in its civil status (legitimation, recognition) unless at that moment it is considered by the law of the State to which the father or the mother, as the case may be, belongs as having acquired the nationality of the parent in question.

*Article* 12

An adopted child who does not by the fact of adoption acquire the nationality of the person adopting it retains its original nationality.

*Article* 13

As between the Contracting Parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the central

authority of the State. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The Contracting Parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality.

(*Signed*) S. RUNDSTEIN.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 2

*adopted by the Committee at its Second Session, held in January 1926*

## TERRITORIAL WATERS

The Committee has the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following question:

"Whether there are problems connected with the law of the territorial sea, considered in its various aspects, which might find their solution by way of conventions, and, if so, what these problems are and what solutions should be given to them, and, in particular, what should be the rights of jurisdiction of a State over foreign commercial ships within its territorial waters or in its ports?"

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee consisting of M. Schücking as Rapporteur, M. de Magalhaes and Mr. Wickersham. This report comprises a memorandum by M. Schücking, to which is appended a draft of a Convention; observations by M. de Magalhaes; observations by Mr. Wickersham, and, finally, the text of the draft Convention amended by M. Schücking in consequence of the discussion in the Committee of Experts, together with notes on this amended draft.

The nature of the general question and of the particular questions involved therein appears from the report. The latter contains a statement of principles to be applied and of the solutions of particular questions which follow from these principles. The Committee regards this statement as indicating the questions to be resolved in order to deal with the matter by way of an international agreement. All these questions are subordinate to the larger question set out above.

[1] See the Assembly resolution adopted September 22nd, 1924.

It is understood that, in submitting the subject to the Governments, the Committee does not pronounce either for or against the general principles set out in the report or the solutions proposed on the basis of these principles for various particular problems. At the present stage of its work it is not for the Committee to put forward conclusions of this character. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in M. Schücking's final conclusions, *i.e.*, in the draft convention as amended by him in consequence of the discussion in the Committee.[1] Thus, to take only some examples, M. Schücking in various articles of the amended draft convention raises the questions:

(*a*) Whether several zones of diverse legal character should be recognised as territorial waters or this designation be reserved for the zone within which the powers of the coastal State are most complete.

(*b*) Whether the powers of that State should be described as sovereign rights.

(*c*) What should be the width of the territorial sea and possibly of other zones.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*

VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

Geneva, January 29th, 1926.

## ANNEX

## REPORT OF THE SUB-COMMITTTE

M. SCHÜCKING, *Rapporteur.*
M. DE MAGALHAES;
Mr. WICKERSHAM.

Problems connected with the law of the territorial sea, considered in its various aspects, which might find their solution by way of conventions.

[1] See page 141.

Enquiry, in particular, into the rights of jurisdiction of a State over foreign commercial ships within its territorial waters or in its ports.

### I. MEMORANDUM BY M. SCHÜCKING

At its first meeting, held at Geneva, the Committee of Experts for the Progressive Codification of International Law requested the Sub-Committee of which the undersigned has had the honour to be appointed Rapporteur to consider whether there were any problems connected with the law of the territorial sea, considered in its various aspects, which might find their solution by way of conventions, and, if so, what these problems are, and what solutions should be given to them. The Sub-Committee was asked, in particular, to enquire into the rights of jurisdiction of a State over foreign commercial ships within its territorial waters or in its ports.

The question of territorial waters involves a number of difficult problems of international law. The unsatisfactory manner in which these questions have hitherto been solved has given rise to repeated efforts by various Governments to solve them, either wholly or in part, by international convention.

For example, Lord Derby declared, in a circular note dated 1874: "It appears to be manifest that some limits to maritime jurisdiction must be fixed by general consent among the different nations, and that no nation can have the right to assume by a decree of its own Government a jurisdiction more extended than that sanctioned by such general assent . . ."

In 1911, after the seizure of an English trawler, the "Onward Ho," by a Russian coastal patrol boat in the waters of the Arctic Ocean, the Imperial Russian Government expressed its willingness to agree to the holding of a conference to discuss the extent of territorial waters.

At the time of the Aaland Islands Conference, in 1921, the French and Italian delegates pointed out—and the statement was not contradicted—that, if the general question of territorial waters had to be dealt with, representatives of all States possessing maritime interests should be invited.

In 1923, the Government of Soviet Russia, in a note dated May 23rd, addressed to Great Britain, urged that the question of territorial waters should be examined as a whole by a conference of the Powers concerned, with a view to the conclusion of an international agreement.

In November 1924, a Conference met at Helsingfors to deal with the problem as it affected the Baltic.

Proposals have from time to time been put forward by learned societies for settling these problems by treaty.

The Institut de Droit international has dealt with these questions on various occasions. (See the *Annuaire de l'Institut*, Vols. XII, XIII, XXV, XXVI and XXVIII.)

The International Law Association also interests itself in these questions. (See the Reports of the International Law Association, Vols. 1892, 1895, 1908, 1912, 1922 and 1923.)

A draft convention was provisionally adopted by the Third Committee of the Assembly of Jurists which met at Santiago de Chile in 1912 to codify American international law.

*Cf.* Article 4 of the Declaration on the fundamental laws of the American Continent, drawn up by the American Institute of International Law in 1917.

An extensive codification project has been prepared by the American Institute of Inter-

national Law (Draft Convention of October 12th, 1924). (See the *Revista de Derecho internacional* for November 30th, 1924.)

The question of merchant vessels in internal waters, *i.e.*, in ports, has given rise to action on the part of a learned society.

The Institut de Droit International, in its Hague Regulations of August 23rd, 1898, devoted several articles to the position of merchant vessels in foreign ports from the point of view of their observance of the local laws and regulations.

These instances are sufficient to show how greatly the need for positive rules in this domain has been felt. The absence of results shows at the same time that there are inherent difficulties in these questions. Nevertheless, it may be hoped that, if it is proposed at any time to regulate this matter by convention, valuable guidance will be found in the treaty settlement of analogous problems.

Paragraph (*e*) of Article 23 of the Covenant of the League of Nations imposes the obligation to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." The League of Nations has shown great activity in the execution of the duty entrusted to it. At its invitation and under its auspices the first General Conference on Communications and Transit met at Barcelona on March 10th, 1921. This Conference drew up not only a series of rules for the organisation of general conferences and of the Advisory Committee for Communications and Transit, but also the text of two important Conventions which have since obtained the necessary ratifications and come into force—the first on traffic in transit and the second on the régime of navigable waterways of international concern.

A second General Conference met at Geneva on November 15th, 1923. It drew up, *inter alia*, an important Convention on the International Régime of Maritime Ports. (See with regard to these Conventions the excellent work of M. Charles De Visscher, "Le Droit international des communications," Ghent and Paris, 1924.)

By reason of the complicated character of the question of territorial waters, an agreement as to the establishment of definite rules could only be obtained by drafting a very comprehensive project containing solutions of more questions of detail than will be dealt with in most of the other codification projects to be drawn up by the Committee of Experts for the Progressive Codification of International Law.

On the other hand, we ought to restrict ourselves to problems the undoubted value of whose solution would consist in the establishment of definite rules of law corresponding to the interests of international solidarity.

(See Max Huber, "Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft," *Jahrbuch des öff. Rechts*, Vol. IV, pp. 102 *et seq.*)

Then, again, we should strictly confine ourselves to dealing with such questions concerning territorial waters as arise in time of peace and are within the domain of international public law. Questions of private law relating specially to the law of territorial waters, and questions connected with the law of war and of neutrality, are excluded. In this we are acting upon the resolutions of the Committee of Experts for the Progressive Codification of International Law.

### *I. The Notion of Territorial Waters*

We must begin by answering the question: "What is meant by the expression territorial waters?"

The clearest and most accurate definition is put forward by those learned societies which define territorial waters as an area of water of a distinct geographica

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dem Küstenstaat innerhalb des Küstenmeeres ausgeübte Gewalt als das Primäre; als die Regel, und die Meeresfreiheit als das Sekundäre, als die Ausnahme? Beantwortet man die Frage bejahend, so folgt daraus, dass man in dem Küstenmeer einen integrierenden Teil des Staatsgebietes erblickt, will man aber die Frage in einem ganz entgegengesetzen Sinn beantwortet wissen, so hat man sich für die Meeresfreiheitstheorie ausgesprochen. Schliesslich lässt sich denken, dass die Staatgewalt und die Meeresfreiheit gleich stark auftreten, sodass keine von diesen das Uebergewicht zu haben scheint; in diesem Fall kann unsere Frage nach keiner von den beiden oben angegebenen Richtungen beantwortet werden, sondern das Küstenmeer muss dann entweder für einen Teil des Staatsgebietes und zugleich einen Teil des offenen Meeres oder für eine Uebergangsstufe gehalten werden, oder man kann

Störck beipflichten, wenn er lehrt, die Küstengewässer seien nicht Inland, nicht Ausland, auch nicht Uebergangsstufe zwischen Inland und Ausland, sondern lediglich Küstengewässer mit allen den Attributen, die die ältere und jüngere Praxis ihnen zuweisen."

One of these theories is based upon the idea of the dominion of the coastal State over the territorial sea—a dominion which must be restricted by certain

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It might be denied that these rights exercised by coastal States are based upon a right of dominion, and it might perhaps be concluded that coastal States have from time immemorial exercised an exclusive right of user in the territorial sea. The exclusive utilisation of the riches of the sea would then be merely a case of the extension of a special historical right. The following

### *I. The Notion of Territorial Waters*

We must begin by answering the question: "What is meant by the expression territorial waters?"

The clearest and most accurate definition is put forward by those learned societies which define territorial waters as an area of water of a distinct geographical character.

The resolutions of the Institut de Droit international of 1894 contain provisions with regard to the right of sovereignty of a State over a zone of the sea which washes its coasts. Certain bays and straits are assimilated to this zone.

The decisions of the International Law Association of 1895 adopt the same standpoint.

According to the most recent project prepared by the American Institute of International Law in 1924, the following are assimilated to territorial waters: straits and maritime channels which are not subject to special dispositions, certain bays, and the sea surrounding certain islands.

These definitions contain the idea of a coastal sea, *i.e.*, waters which follow the sinuosities of an open coast. They also cover expanses of water enclosed by bays the entrance to which from the sea does not exceed a certain width. Wider bays are often treated in the same way as a result of historical rights accorded to the coastal State by the community of nations. This definition of territorial waters also applies to straits and natural maritime channels if they are not subject to a special régime in consequence of a collective convention.

Finally, the doctrine of territorial waters influences the legal status of artificial maritime channels if these are not subject to special rules, as the majority of them are.

### *II. The Legal Status of Territorial Waters*

The most diverse theories have been put forward as to the legal status of territorial waters. They may, however, be divided into two general categories:

See FAUCHILLE: *Traité de Droit international public*, Vol. I, Part 2, Paris, 1925, p. 131: ". . . les unes font rentrer la mer territoriale dans le territoire même de l'Etat; les autres dénient qu'elle constitue un véritable territoire maritime."

See also BJÖRKSTEN: *Das Wassergebiet Finnlands in Völkerrechtlicher Hinsicht*, Helsingfors, 1925, p. 102: "Wenn man die Frage beantworten will, ob das Küstenmeer zum Staatsgebiete gehört oder nicht, hat man erst eine andere Frage zu beantworten: Erscheint uns die von dem Küstenstaat innerhalb des Küstenmeeres ausgeübte Gewalt als das Primäre; als die Regel, und die Meeresfreiheit als das Sekundäre, als die Ausnahme? Beantwortet man die Frage bejahend, so folgt daraus, dass man in dem Küstenmeer einen integrierenden Teil des Staatsgebietes erblickt, will man aber die Frage in einem ganz entgegengesetzen Sinn beantwortet wissen, so hat man sich für die Meeresfreiheitstheorie ausgesprochen. Schliesslich lässt sich denken, dass die Staatgewalt und die Meeresfreiheit gleich stark auftreten, sodass keine von diesen das Uebergewicht zu haben scheint; in diesem Fall kann unsere Frage nach keiner von den beiden oben angegebenen Richtungen beantwortet werden, sondern das Küstenmeer muss dann entweder für einen Teil des Staatsgebietes und zugleich einen Teil des offenen Meeres oder für eine Uebergangsstufe gehalten werden, oder man kann

Störck beipflichten, wenn er lehrt, die Küstengewässer seien nicht Inland, nicht Ausland, auch nicht Uebergangsstufe zwischen Inland und Ausland, sondern lediglich Küstengewässer mit allen den Attributen, die die ältere und jüngere Praxis ihnen zuweisen."

One of these theories is based upon the idea of the dominion of the coastal State over the territorial sea—a dominion which must be restricted by certain rights of common user in favour of other States. The other theory propounds the freedom of the sea and only recognises certain restricted rights in favour of the coastal State in the domain of the so-called territorial sea.

This theory leads to strange contradictions. It is unable to oppose the constant and unilateral extension of the rights of the coastal State in respect of the territorial sea, for States have never hesitated to increase the exercise of rights arbitrarily by unilateral act if their real or imaginary needs have so required. We would venture to point out that none of the claims to a coastal State's jurisdiction were put forward or enforced until the 19th century. (See RAESTAD: "La mer territoriale," Paris, 1913, p. 182.) Nor can these claims be based upon special isolated rights of servitude. If we base them on the right of established possession (as FAUCHILLE does in the work already quoted, p. 147), we come very near to recognising a general right of dominion.

Further, the doctrine of the right of dominion of the coastal State is quite in accordance with the traditions of international law. The most famous doctrine on the theory of the territorial sea is the thesis of BYNKERSHOECK: *Terrae dominium finitur ubi finitur armorum vis.* The idea of *terrae dominium* must be synonymous with the idea of ownership, which, in international law, can only mean dominion over territory.

It might at first sight be imagined that it is of no importance which of the two theories is adopted. They agree in declaring that the coastal State possesses certain rights in the territorial sea and that other States have a certain right of common user in it. If the matter is examined more closely, however, it will be seen that the solution of this question of principle is not a matter of indifference in practice. If we accept the coastal State's right of dominion, we must admit that it would undoubtedly be legally entitled to extend its dominion in new directions, provided, of course, that such action did not conflict with the right of common user of other States or with the provisions of conventions already concluded. Two examples taken from recent international practice illustrate the effect of this principle:

"C'est ainsi que la France et la Grande-Bretagne ont pu respectivement, dans les limites de leurs eaux côtières, sans soulever des observations d'aucune autre Puissance, se livrer aux travaux de percement d'un tunnel sous la Manche. De même, la Grande-Bretagne, sans que son droit ait été davantage contesté, exploite sous la mer, à plusieurs kilomètres de sa côte, des mines d'étain ou de cuivre en Cornouailles, et des mines de charbon dans le Comté de Cumberland, ainsi qu'entre Folkestone et Douvres." (FAUCHILLE, *op. cit.*, p. 205.)

It might be denied that these rights exercised by coastal States are based upon a right of dominion, and it might perhaps be concluded that coastal States have from time immemorial exercised an exclusive right of user in the territorial sea. The exclusive utilisation of the riches of the sea would then be merely a case of the extension of a special historical right. The following

fact in law leaves no doubt as to the nature of the rights exercised by the coastal State in respect of the territorial sea. It is only in recent times, however, that States have claimed rights of dominion in the air above the territorial sea.

"Les Etats, tant dans leur droit conventionnel que dans leur droit interne, sont unanimes à considérer, au point de vue aérien, la mer côtière comme une fraction de leur territoire. La convention aérienne du 13 octobre 1919 est, à cet égard, particulièrement explicite: après avoir reconnu que 'chaque Puissance à la souveraineté complète et exclusive sur l'espace atmosphérique au-dessus de son territoire,' son article premier déclare, en effet, que, 'au sens de la convention, le territoire d'un Etat sera entendu comme comprenant le territoire national métropolitain et colonial, ensemble, les eaux territoriales adjacentes au dit territoire.' C'est également la règle que consacrent les conventions particulières conclues par les Etats: France et Suisse, 9 décembre 1919, article 2; Danemark et Grande-Bretagne, 23 décembre 1920, article premier; Allemagne et Pays-Bas, 24 juillet 1922, article premier; Grande-Bretagne et Pays-Bas, 11 juillet 1923, article premier, etc. On la trouve encore formulée expressément par les lois intérieures des différents pays. Citons à ce sujet le décret espagnol du 25 novembre 1919, article 11; le décret-loi italien du 25 novembre 1919, article premier; l'acte anglais de 1920, chapitre 80, préambule; le décret russe du 17 janvier 1921, article 20 . . ." (FAUCHILLE, *op. cit.*, pp. 1151 *et seq.*)

These facts can only be upheld by a legal conception according to which the territorial sea is itself under the dominion of the coastal State, subject to the restrictions of common user and of international conventions. They justify us in concluding that the only valid theory is that of the right of dominion of the coastal State over the territorial sea within fixed limits. The facts referred to also give practical ground for the belief that it is absolutely necessary to recognise by international convention the coastal State's rights of dominion over the territorial sea. This would not be an innovation but merely the final outcome of an evolution which finds expression in a series of international conventions.

". . . le droit international, dans son état actuel, admet que la mer territoriale, sans être susceptible de propriété au sens privé du mot, l'est dans le sens international de souveraineté. Pour lui, l'Etat riverain est souverain de la mer côtière, comme de la terre ferme; sa souveraineté sur elle est comme le prolongement de sa souveraineté sur son territoire: elle est une portion de son domaine et non pas simplement une partie du vaste océan envisagé dans sa majestueuse unité. La frontière de chaque Etat maritime se trouve dès lors fixée à la limite même de la mer territoriale. Le droit conventionnel et le droit interne des Etats sont, à cet égard, très explicites. La XIII• Convention de la Paix de la Haye du 18 octobre 1907 concernant les droits et les devoirs des Puissances neutres en cas de guerre maritime, qu'ont signée 43 Etats, dont 25 l'ont ratifiée ou y ont adhéré, considère que le caractère neutre doit être appliqué aux eaux territoriales d'un Etat étranger aux hostilités, aussi bien qu'à son territoire terrestre. Parmi les lois intérieures des Etats, on peut citer la loi italienne du 16 juin 1912 sur le transit et le séjour des navires marchands le long des côtes, qui qualifie de 'mer de l'Etat' la zone de mer comprise entre dix milles marins du rivage (article premier); les règlements roumain du 5 décembre 1912 (article premier) et français du 26 mai 1913 (article 2), sur l'admission en temps de guerre des navires étrangers, qui désignent respectivement d' 'eaux roumaines' et d' 'eaux territoriales françaises' les eaux qui longent les côtes de la Roumanie et de la France; l'ordonnance des Pays-Bas du 30 octobre 1909, sur le droit d'entrée des navires de guerre étrangers, qui décide que les eaux territoriales du Royaume sont 'dans les limites' de celui-ci (article 10)." (FAUCHILLE, *op. cit.*, pp. 157 *et seq.*)

The territorial sea will always retain its special character as part of the area of a State's dominion. This special character is founded not merely on the right of common user possessed by other States but also on the fact that the cession, for example, of this area of dominion to another State, without the simultaneous cession of the coastal territory, cannot be regarded as legally possible. The intimate connection between the two precludes such a proceeding. Nor can the territorial sea be regarded, as certain Civil Codes in Latin America suggest, as public property.

Argentine Civil Code, Art. 2374.—. . . the following are the *public property* of the general State or of the individual States:

16. The seas adjacent to the territory of the Republic, to a distance of one marine league, measured from the lowest tide line, but the right of police as to objects concerning the security of the country and the observance of the fiscal laws extends to a distance of four marine leagues measured in the same manner.

Chilean Civil Code of December 15th, 1855, Art. 593.—La mer qui touche les côtes (adjacentes) jusqu'à la distance d'une lieue marine, mesurée à compter de la ligne de la plus basse marée, est mer territoriale et appartient au domaine national; cependant, le droit de police pour tout ce qui concerne la sûreté du pays et l'observation des lois fiscales s'étend jusqu'à la distance de quatre lieues marines mesurées de la même manière.

Questions regarding the cession of the territorial sea and its classification in internal law are not, strictly speaking, questions for settlement by codification.

See FAUCHILLE, *op. cit.*, p. 72; Ch. DE VISSCHER et GANSHOF: "Le différend de Wiellingen," *Revue de Droit international*, 3rd Series, Vol. I, p. 293; BJÖRKSTEN, *op. cit.*, p. 103.

As proof of the essentially dominant character of the rights of the coastal State in respect of the territorial sea, the fact that all schemes of codification seek to assert the right of dominion of the coastal State over the territorial sea may be claimed as decisive.

*Cf.* the project of the Institut de Droit international, 1894: "L'Etat a un *droit de souveraineté* sur une zone qui baigne la côte."

The project of the International Law Association, 1895, uses the same expression.

*Cf.* the project of the International Law Association, 1923 (Storny Project), Article 1: "L'Etat possède la *juridiction* sur une zone de la mer qui baigne ses côtes. Cette zone porte le nom de mer territoriale."

*Cf.* the project of the American Institute of International Law, 1924, Article 6, Paragraph 1: "The American Republics exercise the right of sovereignty not only over the water but over the bottom and the subsoil of their territorial sea. By virtue of that right, each of the said Republics alone can exploit or permit others to exploit all the riches existing within that zone."

Article 1 of the Convention to be proposed might therefore be worded as follows:

"*The character and extent of the rights of the riparian State.*

"*Article* 1.—The State shall have an unlimited right of dominion over the zone which washes its coast, in so far as, under general international

law, the rights of common user of the international community or the special rights of any State do not interfere with such right of dominion.

"The right of dominion shall include rights over the air above the said sea and the soil and subsoil beneath it."

*III. The Extent of the Territorial Sea under the Dominion of the Coastal State*

The most difficult question is that of the extent of the territorial sea. The secondary question, namely, at what point the landward limit of the territorial sea is situated, will be dealt with later. The problem of the limit of the territorial sea on the side of the open sea is complicated by the fact that the very States which, actuated by the desire for dominion, are constantly satisfying their needs by extending their dominion in the territorial sea, nevertheless consistently refuse to sign any instrument of public law extending their dominion over a definite area. It is their traditional habit to establish definite zones for special purposes by means of their laws and administrative practice. The following synopsis will suffice to explain the matter clearly:

*Great Britain.*—The law on *jurisdiction* in territorial waters, known as the Territorial Waters Jurisdiction Act of August 16th, 1878, provides that any offence committed by any person, whether a British subject or not, within the limits of the territorial waters of His Majesty's possessions comes within the jurisdiction of the Admiralty (Article 2), and that for the purpose of offences coming within the jurisdiction of the Admiralty the territorial waters include all that portion of the high seas situated less than one maritime league from the coast, reckoned from low-water mark (Article 7).

By virtue of customary law, the extent of the *fishing zone* reserved for fishermen is three miles. This limit is established as between Great Britain and France, Belgium, the Netherlands, Germany and Denmark in Article 2 of the Hague Convention of May 6th, 1882.

The *Customs zone* used to extend for 12 miles under the old laws (the Hovering Acts 1736, 1838). Under the Customs Consolidation Act of 1876, the extent of the Customs zone is fixed at three nautical miles.

By virtue of customary law, the extent of British *neutral waters* is three nautical miles. (*Revue générale de Droit international public*, Vol. 21, p. 413, note by M. RAESTAD.)

*United States of America.—Customs zone* and *neutrality zone:* Under the Naval Code, the *neutrality zone* extends for three nautical miles. Under the Acts of 1797, 1799 and 1807, the *Customs zone* extends for 12 nautical miles. The Supreme Court pronounced a judgment on April 30th, 1923, in which it deals first with the text of the 18th amendment to the Constitution. It notes, *inter alia*, that the territory subject to the jurisdiction of the United States include the harbours, bays and other arms of the sea along their coasts and the belt of water which washes those coasts to the width of one nautical league or three geographical miles. . . . The Court refuses to allow any vessels entering the territorial waters of the United States, whether foreign or national, to carry any alcoholic liquors either as cargo or as stores, even under seal. (*Cf.* PAULUS, "La mer territoriale," *Revue de Droit international et de Législation comparée*, 3rd Series, Vol. 1, pp. 409 *et seq.*)

*Netherlands.*—Declaration by the Minister for Foreign Affairs in the Lower House in 1924: "Whereas, in view of recent Government communications, adhesion to the idea of extending the limit of the territorial sea from the point of view of the maintenance of *neutrality* cannot for the present be expected on the part of the principal maritime Powers (PAULUS, *op. cit.*, p. 412), the Netherlands have fixed three nautical miles as the limit of their neutral waters in their declarations of neutrality of 1904 and 1914."

*German Reich.*—Article 3 of the "Prisenordnung" of September 30th, 1909, reads: "Das Prisenrecht ist nicht geltend zu machen: (*a*) innerhalb *neutraler Hoheitsgewässer*, d.h. innerhalb eines Seegebietes, das in einer Breiteausdehnung von 3 Seemeilen von der Niedrigwasserküste gerechnet, die Küste und die zugehörigen Insel und Buchten begleitet; als zugehörig gelten: Inseln, wenn sie nicht weiter als 6 Seemeilen von einer demselben Staate gehörigen Festlandsküste entfernt sind, Buchte wenn ihre Küste ausschliesslich im Besitze neutrale Staate steht und ihre Oeffnung 6 Seemeilen oder weniger ist."

In a note addressed to Finland on February 24th, 1924, Germany declares that she regards the three-mile zone as the only recognized zone. The note goes on to protest against Finland's action in extending her *Customs control* beyond this limit.

According to the schedule of zones prohibited to aerial navigation (Nachweisung der Grenzen der für den Luftverkehr verbotenen Zonen) attached to the Decree of the Prussian Ministers of Public Works and of the Interior dated April 29th, 1914 (*Deutsche Luftfahrzeitschrift* of May 13th, 1914, pp. 219, 220), the manœuvring prohibition extends to a distance of three nautical miles to seaward of the coast in respect of the zones (defined in detail in the schedule) of Königsberg, Swinemunde, Kiel, the North Sea coasts, and Heligoland.

*Reserved fishing zone:* As a contracting party to the International Convention on Fishing in the North Sea, concluded at The Hague on May 6th, 1882, Germany adopted the three-mile limit (Article 2) for the fishing zone reserved for the use of her nationals on the German coast of the North Sea between the Danish and Dutch frontiers (see Imperial Law of April 30th, 1884, putting the said convention into force). The same limit is also observed, though there is no express provision to that effect, on the German coast of the Baltic Sea between the Danish and Russian frontiers. (*Revue générale du Droit international public*, Vol. 21, p. 404.)

*France.—Fishing zone:* Three nautical miles according to the Decrees of 1862 and the law of 1888.

*Customs zone:* Two myriametres according to the law of March 27th, 1813.

*Neutrality zone* (Decree of October 19th, 1912): "Pour l'application des règles de la convention 13, en date du 18 octobre 1907, les eaux territoriales françaises s'étendent en deçà d'une limite qui est fixée à six milles marins au large de la laisse de basse mer, le long de toutes les côtes et des bancs découvrant qui en dépendent, ainsi qu'autour du balisage fixe qui détermine la limite des bancs non découvrants."

In the instruction of the French Minister of Marine of December 19th, 1912, concerning the application of international law in the event of war, it is stated in Articles 22 and 23: "Pour l'application de la XIII$^{me}$ Convention de La Haye, vous considérerez les eaux territoriales comme ne s'étendant jamais à moins de trois milles des côtes, des îles ou des bancs découvrant qui en dépendent, à compter de la laisse de la basse marée et jamais au-delà de la portée du canon. Vous respecterez toute limite de cette nature qui se trouverait ainsi régulièrement fixée avant l'ouverture des hostilités."

*Safety zone* (Decree of October 24th, 1913, prohibiting the flying or manœuvring of aircraft in certain zones, Article 1): "Sauf autorisation spéciale, il est défendu aux aéronefs de passer ou d'évoluer: 1° au-dessus de la zone comprise à l'intérieur du périmètre myriamétrique (en annexe, la zone maritime de dix kilomètres) indiqué pour: Toulon, Iles d'Hyères, Rochefort, Aix, Oléron, La Rochelle, Ré, Lorient, Groix, Brest, Ouessant."

*Belgium. — Fishing zone:* Three nautical miles under the law of August 19th, 1891.

*Customs zone:* One myriametre under the law of June 7th, 1832.—*Ordinary jurisdiction:* "La jurisprudence paraît se rallier à la limite de trois milles, notamment pour la détermination de la compétence dans les actions du chef de l'abordage." (*Revue générale de Droit international public*, Vol. 21, p. 408.)

*Spain.*—Territorial waters were established in Spain by Royal Decree of 1760. (FULTON, "The Sovereignty of the Sea," London, 1911, p. 569.) The six-mile zone is the *Customs limit* under the Customs Law of October 15th, 1894, and also the *fishing limit* under the

decree of December 17th. The *neutrality zone*, which coincides with the *zone of jurisdictional waters*, extends for six miles.

*Portugal.*—The *Customs zone* extends for six nautical miles under the Customs Law of May 27th, 1911, Article 216.

*Fishing zone:* Three nautical miles under the law of October 28th, 1908. Under a Treaty of Commerce and Navigation concluded with Spain, the fishing zone reserved for Portuguese nationals extends for six nautical miles (Annex 6, Articles 2 and 3).

*Italy.*—Italy applies two limits in respect of Customs control: a zone of five kilometres for the supervision of navigation, and a zone of ten kilometres within which the captain of any vessel must be in possession of a passport authorising him to enter territorial waters (Customs Law of January 26th, 1896, Chapter II, Article 27). On the African coast, the Customs zone is 12 nautical miles wide (Royal Decree of February 4th, 1913, Article 2).

The Decree of June 16th, 1895, concerning foreign *warships* which in time of peace approach the ports or coastal waters of the area in which they are navigating, prohibits foreign warships from engaging in firing practice within gunshot of the shore, unless they have obtained special authorisation through the diplomatic channel to do so.

Under the terms of a decree of August 20th, 1909, foreign vessels in port may be required to withdraw to gunshot range if a state of siege is established. In case of war, the sea of the State may be completely closed. By "the sea of the State" is to be understood a zone of coastal sea ten nautical miles wide (*war* and *neutrality zone*).

*Greece.—Fishing zone:* Three nautical miles under the Royal Decree of January 8th, 1898.

*Customs zone:* A belt six nautical miles wide from the coast constitutes the zone of supervision.

*Brazil.*—The *neutrality zone* in the world war was three nautical miles wide; a neutrality zone five nautical miles wide was established by *Chile* and *Uruguay* in their declaration of neutrality of August 7th, 1914. (BJÖRKSTEN, *op. cit.*, p. 54.)

*Denmark.—Fishing zone:* "En accédant à la Convention internationale réglant la police de pêche dans la Mer du Nord, conclue à La Haye le 6 mai 1882, le Danemark a adopté la limite de trois milles marins pour la zone de pêche réservée aux pêcheurs nationaux sur les côtes danoises."

The present situation seems to be that Denmark recognises the three-mile zone in respect of all its coasts for purposes of fishing, in relation to the States signatory to the Hague Convention of May 6th, 1882, but that in relation to other States, notably Sweden, it maintains in respect of all its coasts a limit of one geographical league, which is also the general limit of Danish territorial waters. (RAESTAD, in the *Revue générale de Droit international public*, Vol. 21.)

*General limit* (Royal Decree of February 12th, 1812, applicable both to Denmark and to Norway): "Our territorial sovereignty, in all cases in which it is necessary to determine its limits from the seashore, shall be deemed to extend to a distance of one ordinary nautical league, reckoned from the furthest island or islet which is not submerged by the sea."

*Norway.—Fishing zone:* The Royal Decree of December 22nd, 1906, which contains instructions for the warships responsible for the supervision of the coasts, declares that all persons other than Norwegian citizens or inhabitants of the Kingdom are prohibited from fishing in Norwegian territorial waters, the limit of which is fixed for purposes of fishing at a distance of one ordinary nautical league from the furthest island or islet which is not submerged by the sea.

By a law of July 14th, 1922, the *Customs zone* is fixed at a width of ten marine leagues (*Quartmeilen*).

*Sweden.—Customs zone:* Law of July 1st, 1904, Article 1, paragraph 2: one nautical league.

*Neutrality zone:* The regulations concerning maritime prizes of April 12th, 1808, Article 1, paragraph 1, provides that no vessel may be captured nearer the coast than at a distance of one nautical league (one-fifteenth of a degree).

According to paragraph 2 of the same article, the limit of neutral waters off a fortress coincides with the furthest gunshot range.

In the world war, Sweden, like Norway, was unable to maintain her claim to a neutrality zone of one nautical league. The belligerents paid no attention to this zone. In two publications dated November 29th, 1915, and June 19th, 1916, the submarine warships of the belligerents were prohibited from staying in or passing through Swedish waters within a limit of "three Swedish minutes," but it is highly characteristic that the publication of August 14th, 1916, which requires merchantmen to fly their flags in Swedish territorial waters, does not contain any special provisions regarding the extent of the neutrality zone (BJÖRKSTEN, *op. cit.*, p. 59).

*Fishing zone* (Royal Proclamation of May 5th, 1871): One nautical league. The same dispositions are contained in Article 1 of the Convention between Sweden and Denmark of July 14th, 1899.

*Russia.—Customs zone:* Under the law of December 10th, 1909, the Customs zone extends for twelve nautical miles.

Article 3 of the Peace Treaty between Soviet Russia and Finland establishes a zone of four miles for Russian territorial waters; under the terms of Paragraph 4 of Article 3, Russia has the right to extend her territorial sea to a zone exceeding four miles in width in the eastern part of the Bay of Kronstadt.

The practice of international law (conventions, conferences, exchanges of notes, arbitration tribunal awards) varies greatly. Sometimes the system of national legislation is adopted and definite zones are created.

Convention between the United States of America and the United Kingdom concerning the regulation of the traffic in alcoholic liquor, signed at Washington January 23rd, 1924, Article 1: The High Contracting Parties declare that it is their firm intention to maintain the principle that the real limit of territorial waters is at a distance of three nautical miles from the coast towards the high seas, reckoned from low-water mark. Similar conventions were concluded between the United States of America and Germany; the United States of America and Sweden (April 22nd, 1924); the United States of America and Norway (May 24th, 1924); the United States of America and Denmark (April 29th, 1924); and the United States of America and the Netherlands (PAULUS, *op. cit.*, p. 412). It is only in the treaty concluded with Great Britain that the limit of three miles is fixed. But all these treaties allow Customs control to be exercised outside the zone of the territorial sea. The peculiarity of these conventions lies in the fact that the Customs limit is not the same in all cases. It depends upon the speed of the vessel, subject to control; for supervision may not be exercised at a greater distance from the coast than the vessel in question can cover in one hour.

A three-mile fishing zone is recognised in the following treaties: Great Britain-United States of America (October 21st, 1818); France-Great Britain (August 2nd, 1839, and November 11th, 1867); International Convention regarding Fishing in the North Sea (May 6th, 1882); Denmark-Great Britain (June 24th, 1901); United States of America-Japan-Russia-Great Britain (July 7th, 1911).

A six-mile fishing zone is recognised in the treaty between Spain and Portugal of March 27th, 1893; a fishing zone of one nautical league between Denmark and Sweden (July 14th, 1899); a zone of one nautical mile between Austria-Hungary and Italy (December 6th, 1891, and February 11th, 1906); and a zone of ten nautical miles between Roumania and Russia (October 16th–29th, 1907).

On November 29th, 1902, M. Asser, acting in the capacity of arbitrator, ruled, in the question of the United States fishing vessels "James Hamilton Lewis" and "C. H. White," which had been seized by Russian cruisers, that, in the absence of any agreement, Russian territorial waters could not extend as far as 11 miles from the coast.

In the arbitration award of 1893 in the Anglo-American dispute concerning seal-hunting

in the Behring Sea, we find the following words: ". . . if such seals are beyond the ordinary limit of three miles . . ."

As regards the safety zone, the Convention of October 29th, 1888, concerning the Suez Canal stipulates a width of three miles.

A neutrality zone of five and three miles is provided for in the Anglo-American (U. S. A.) Treaty of December 31st, 1806.

A criminal jurisdiction zone of five miles is provided for in the Treaty of Montevideo of January 23rd, 1889 (Article 12).

*The "Elida" case.*—"Die 'Elida' war ein schwedisches Fahrzeug, das am 8. Mai 1915 von einem deutschen Kreuzer Treleborg, jedenfalls ausserhalb der 3-Meilen-Grenze, aber vielleicht innerhalb der schwedischen 4-Meilen-Grenze festgenommen wurde. Das Kieler-Prisen-Gericht sprach die Prise frei. Das Urteil wurde unter andern darauf gegründet, dass die Festnahme wahrscheinlich innerhalb der 4-Meilen-Grenze und mithin in schwedischen Gewässern stattgefunden habe. Diese Betrachtungs-Weise konnte das Ober-Prisen-Gericht in Berlin nicht gutheissen. Die Prisen-Ordnung sei in diesem Punkte klar. Die 3-Meilen-Grenze sei die einzig anerkannte Grenze. Auch hat sich die deutsche Regierung im Jahre 1897 auf eine von der schwedischen Regierung an die deutsche Gesandschaft in Stockholm gerichtete Mitteilung über die Fischerei-Hoheits-Grenze darauf beschränkt, den Anspruch Schwedens auf die 4-Meilen-Grenze für die Fischerei nicht zu bestreiten." (See BJÖRKSTEN, *op. cit.*, pp. 47 *et seq.*)

*The "Heina" case.*—"Ein norwegisches Fahrzeug wurde am 13. Dezember 1914 in einer Entfernung von $4^5/_6$ See-Meilen von der dänischen Seeküste festgenommen. In dem Urteile wurde festgestellt, dass, weil Dänemark keine breitere Neutralitäts-Zone als eine von 4 See-Meilen beanspruche, Frankreich keine andere zu respektieren brauche." (BJÖRKSTEN, *op. cit.*, p. 48.)

"Das Aalands-Abkommen vom 20. Oktober 1921 enthält Bestimmungen betreffend die Ausdehnung der Aaländischen Territorial-Gewässer, d.h. der Zone, welche der Neutralisierung unterliegt. Einmal darf sich der Umfang der Zone niemals über eine longitudinal und latitudinal genau angegebene Linie erstrecken (diese bildet eine Maximums-Grenze), sodann wird die Breite der Zone der Territorial-Gewässer innerhalb der Zone auf 3 SM festgestellt (Art. 2)."

Sometimes, however, the view adopted is that of the sole dominion of the riparian State.

Under Article 4 of the Convention of 1888 concerning the Suez Canal, the provisions of that article are applicable to a zone of three miles outside the ports.

*Cf.* Hay-Pauncefote Convention of 1900, Article 2, paragraph 5: "The provisions of this article shall apply to waters adjacent to the Canal within three marine miles of either end."

"Nach Artikel 2 des Panama-Abkommens von 1903 erstreckt sich die durch das Abkommen festgestellte Zone 3 See-Meilen von den beiden Endungen des Kanals." (BJÖRKSTEN, *op. cit.*, p. 45.)

In opposing the Spanish claim to a six-mile zone, the United States of America and Great Britain upheld a three-mile zone. In 1875, Secretary Fish declared to Thornton: "We have always understood and assented that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a nautical league from its coasts." (FULTON: "The Sovereignty of the Sea," Edinburgh and London, 1911, p. 665, No. 2.)

"Auf der zweiten Haager Friedens-Konferenz wurde die Frage im Zusammenhang mit dem Minen-Abkommen behandelt. Der brit. Entwurf eines Minens-Abkommens enthielt das Verbot gegen die Legung von Minen ausserhalb der Territorial-Gewässer des Kriegsführenden, Festungen ausgenommen. In der 2. Unterkommission der 3. Kommission schlug Van der Heuvel anstatt des Ausdruckes 'Territorial-Gewässer' die Annahme einer fixen Grenz-Bestimmung vor. Der britische Delegierte erklärte, s.E. sei unter Küsten-

Gewässer eine Küsten-Zone in einer Breite von 3 See-Meilen zu verstehen. Tornielli fand, dass die Feststellung der Ausdehnung der Küsten-Gewässer ausserhalb der Zuständigkeit der Konferenz liege. Dagegen wandte Van der Heuvel ein, es handle sich lediglich um die Feststellung einer Zone innerhalb deren Minen gelegt werden können. Der Ausschuss, dem die Ausarbeitung einer Konvention überlassen war, schlug in Artikel 2 seines Entwurfes die 3-Meilen-Zone vor; der Vorschlag wurde mit schwacher Mehrheit von der Kommission angenommen. Indem der Konferenz vorgelegten Entwurf war aber von keiner 3-Meilen-Grenze mehr die Rede; das Verbot gegen Minen-Legen auf offener See war weggelassen." (BJÖRKSTEN, *op. cit.*, pp. 46 *et seq.*)

"Während des Weltkrieges hat Deutschland ohne Rücksicht auf die schwedischen Ansprüche auf eine 4-Meilen-Zone mit Berechnung einer 3-Meilen-Zone Minen in den Schweden bespülenden Gewässern gelegt." (BJÖRKSTEN, *op. cit.*, p. 47.)

"Auf der vom 10.–20. Oktober 1921 Abgehalten Aalands-Konferenz wurde im Entwurf eine 3-Meilen-Zone festgelegt." (BJÖRKSTEN, *op. cit.*, pp. 47 *et seq.*)

The treaty concluded in 1924 between Great Britain and the Russian Soviet Republic declares (paragraph 2 of Article 5): "This article shall not be deemed to prejudice the views held by either party of the limits in international law of territorial waters."

The gunshot zone is identified with a width of three nautical miles in the treaty concluded in 1806, but not ratified, between Great Britain and the United States, in Lord Stowell's award given in 1800 in the case of the "Twee Gebroeders" and in Story's judgment in 1812 in the case of the "Ana."

On February 25th, 1897, in the case of the Australian whaler "Costa Rica Packet," which had seized a Dutch ship, the arbitrator, M. F. DeMartens, declared that the right of sovereignty of a State over territorial waters is determined by gunshot range. (FAUCHILLE, *op. cit.*, pp. 182 *et seq.*)

On November 29th, 1902, M. Asser, acting in the capacity of arbitrator, ruled, in the question of the United States fishing vessels "James Hamilton Lewis" and "C. H. White," which had been seized by Russian cruisers, that, in the absence of any agreement, Russian territorial waters could not extend as far as 11 miles from the coast. (FAUCHILLE, *op. cit.*, p. 183.)

## All the codification projects are in agreement as to the necessity of establishing exact limits for the territorial sea.

Institut de Droit international, draft of 1894, Article 2: "La zone de mer territoriale s'étend à six milles marins (60 au degré de la latitude) de la laisse de basse marée sur toute l'étendue des côtes."

Article 4: "En cas de guerre, l'Etat riverain neutre a le droit de fixer, par la déclaration de neutralité ou par notification spéciale, sa zone neutre au-delà de 6 milles, jusqu'à portée des canons des côtes."

*Cf.* OPPENHEIM, in the *Annuaire de l'Institut de Droit international* for 1913 (pp. 404 *et seq.*): "Comme je ne crois pas qu'il soit recommandable d'étendre la limite de la mer territoriale au-delà de trois milles, je voudrais que l'Institut reconsidérât son attitude au sujet de l'étendue de la mer territoriale . . . J'adhère à la proposition de sir Th. Barclay d'abandonner l'article 4 des règles adoptées par l'Institut en 1894. Mais, en son lieu et place, j'aimerais proposer l'article suivant: 'En temps de guerre, la zone de la mer territoriale est la même qu'en temps de paix et des combats en mer ne sont permis, près des côtes des Etats neutres, qu'à une distance de portée de canon des côtes.' Je propose, comme texte de l'article 2 de l'avant-projet, un texte qui suivrait littéralement celui de l'article proposé par sir Th. Barclay en 1892: 'La zone de la mer territoriale s'étend à trois milles marins de la laisse de basse mer dans toute l'étendue des côtes, à moins que l'usage continu et séculaire n'ait sanctionné une zone plus large.' La raison pour laquelle je m'oppose à une extension de la limite de trois milles est que la souveraineté reconnue d'un Etat riverain sur la mer

territoriale ne comprend pas seulement des droits, mais implique aussi de lourdes responsabilités en temps de paix, de même qu'en temps de guerre, et surtout pour les neutres en temps de guerre. Il faut aussi tenir compte de ce que la Grande-Bretagne, les Etats-Unis et plusieurs autres Etats, pour des raisons d'ordre politique, ne consentiront jamais à une augmentation du rayon de la mer territoriale, et, à mon avis, l'Institut ne devrait pas se prononcer en faveur d'une règle qui n'a aucune chance d'être unanimement adoptée en pratique par les Etats."

*Project of Captain Storny* (International Law Association).—Article 1: "La mer territoriale s'étend depuis le rivage jusqu'au point indispensable à l'effet de garantir la défense, la neutralité et d'assurer les services de la navigation et de la police maritime côtière en leurs diverses manifestations." On ne fait figurer ici le droit de pêche exclusive, car nous croyons que ce droit doit faire l'objet d'une réglementation séparée. Article 3: "En général, la largeur de la mer territoriale n'excédera pas six milles." Article 15: "Aucun Etat ne pourra modifier, en cas de guerre, des limites de sa mer territoriale." Article 14: "Les limites acceptées pour la mer territoriale seront marquées, à l'aide d'un signe universel particulier, sur les cartes nautiques dont l'échelle le permettrait, en vue de sa connaissance par tous les navigateurs."

"Im Jahre 1924 wurde die Frage des Küsten-Meeres auf der Stockholmer Tagung der International Law Association in der Vollsitzung erörtert. Die Kommission, die mit den Vorbereitungen der Frage beschäftigt war, schlug als allgemeine Grenze der Küsten-Gewässer 3 SM. vor. (Eine Minorität befürwortete die 6 SM. Grenze.) Die Kommission war darüber einig, dass die Seegrenze des Küsten-Staates für alle Staats-Funktionen nicht gleich zu sein brauche . . ." (BJÖRKSTEN, *op. cit.*, pp. 62 *et seq.*)

See also the report of Dr. DARDAY, *Report of the 25th Conference of the International Law Association*, pp. 547 *et seq.*

"Dans un projet sur les droits fondamentaux du continent américain, qui fut accepté provisoirement par la troisième Commission de l'Assemblée de juristes réunis à Santiago du Chili, en 1912, et qui fut, en 1917, présenté, à La Havane, à l'Institut américain de Droit international, M. Alvarez a proposé que la mer territoriale de l'Amérique êut une distance de 6 milles marins" (Art. 14). (See ALVAREZ, *La Codificación del Derecho internacional en América*, p. 102.)

"C'est également la limite qu'a indiquée M. Pessoa dans le projet de code de droit international public qu'il a rédigé en 1911, à la suite de la décision de la troisième Conférence pan-américaine de 1906, relative à la codification du droit international, et qu'il a présenté en 1912 à l'assemblée des jurisconsultes tenue à Rio-de-Janeiro." (See PESSOA, *Projetto del codigo internacional publico*, 1911.)

American Institute of International Law: Draft Convention submitted to the session of the American Institute of International Law at Lima, Peru, December 20th, 1924. Article 3: "By territorial sea is meant the extent of the ocean which washes the coasts of the American Republics to a distance of . . . marine miles measured from the lowest point of low-water mark." Article 11: "The American Republics may extend their jurisdiction beyond the territorial sea for an additional distance of . . . marine miles for reasons of safety and in order to assure the observance of sanitary and similar regulations . . ."

The necessity of doing so seems to us to be all the more urgent because, in spite of divergencies of doctrine, the theory most widely accepted accords to the riparian State the right to extend the limit of its territorial sea to the range of the coastal guns by unilateral acts.

See OPPENHEIM, paragraph 186, *International Law*.—STRUPP, *Grundzüge des Volkerrechtes*, p. 71: "Doch lässt sich nicht sagen, dass die 3-Meilen-Theorie einem Völkerrechtssatz-entspräche. Auch die frühere Annahme der Kanonenschussweite vermag heute bei der grossen Tragweite der Küsten-Geschütze selbst nicht einmal mehr in dem Sinne einem

Anhalt geben, dass das Küsten-Gewässer keines Falls weiter berechnet werden dürfe als auf Kanonenschussweite. So bleibt es dem einzelnen Landesrecht überlassen, die Küstenmeere bis dann von sich aus zu bestimmen." See the table of opinions given by FAUCHILLE, *op. cit.*, p. 177.

In view of the actual range of the coastal guns, we are faced by a positive rule of international law, the practical application of which would lead, at any rate in peace-time, to quite inadmissible results, which would restrict the freedom of the sea to an intolerable extent. This is also a point of importance in relation to war-time. (See the opinion expressed by OPPENHEIM, quoted *supra*, page 9.)

It is therefore necessary to decide upon a fixed territorial sea zone. If we examine the practice in international law, the codification projects and doctrine, with a view to establishing a fixed zone, we find a wide variety of limits. Whatever limits we may establish, we run the risk of prohibiting some State from exercising its administrative rights in connection with its dominion over the territorial sea to the extent to which it has been exercising them until the Convention comes into force. Further, we run the risk of restricting the rights of common user of other States in domains in which these rights have been exercised without question. On account of these difficulties, the efforts made in various quarters to fix a definite zone appear to have failed. For this reason, the problem can only be solved on the following lines: Within the zone of the territorial sea the rights of other States must be respected, as also the rights of common user in force in respect of the whole of the territorial sea (*e.g.*, the right of pacific passage), and the rights which have hitherto been exercised in consequence of the rights of common user of the sea or by virtue of special treaties. In other words, if a riparian State, such as, for example, the German Reich, has hitherto restricted the exclusive rights of fishing near the coast to a zone of three nautical miles, the Convention to be drawn up must not result, in consequence of the fixing of a wider zone, in fishing vessels not having right of access to the German territorial sea to the extent to which such right of access has hitherto been accorded to them. If the historically acquired rights of other States are respected in this manner, such States should be satisfied, the more so that in principle the width of the territorial sea is to be extended to more than three nautical miles. The most practical limit would perhaps be six miles.

In fixing this limit the following considerations are of importance: First, the three-mile limit cannot be regarded as the zone of dominion generally accepted according to the practice and doctrine of international law. Further, there is the important fact, mentioned above, that according to the most approved doctrine a State has the right to extend its dominion to the range of the coastal guns; consequently, the recognition of the six-mile limit would still involve a sacrifice on the part of many riparian States.

A further argument in favour of the six-mile limit is that the projects of codification which fix a definite limit take a six-mile limit as their point of

departure (*cf.* the project of the Institut de Droit International, 1894, and the project of the International Law Association, 1895).

As has already been observed, the idea of fixing the limit at six miles is not approved by those States which have hitherto exercised more extensive administrative rights than would be accorded to them if a six-mile zone were adopted. This brings us to the two-zone system recognised by many writers.

See the project of the American Institute of International Law. RAESTAD: "La mer territoriale," pp. 175 *et seq.* "Il faut donc envisager, à mon avis, la possibilité d'une différenciation progressive des droits que les nations exercent sur mer . . ." See also WESTLAKE, *International Law*, 2nd edition, pp. 189 *et seq.*; BJÖRKSTEN, *op. cit.*, pp. 65 *et seq.*

The first zone would be fixed. The basis of this zone should be the right of dominion exercised in principle by two riparian States subject to the reservations mentioned above. In the second zone the only rights of riparian States which should be recognised are those which have hitherto been exercised for purely administrative purposes. The Convention should enumerate the rights which riparian States may exercise in the second, variable, zone by acts of public authority. The possibility must be borne in mind that States which have not hitherto exercised rights by acts of public authority in this second zone might also become entitled to exercise rights there in virtue of the Convention.

Nevertheless, there is a serious danger that States might exhibit a general tendency to create for themselves a second zone which would be analogous in character to the first. It would be well to take steps in advance to prevent this. If riparian States are restricted in the manner proposed, in the second zone, to the exercise of definite rights which have been exercised up to the time of the coming into force of the Convention, it will be easier to avoid the difficulty of having to establish an abnormal limit for the exercise of rights in the second zone, *i.e.*, the variable zone. It would be of decisive importance for the future to determine the area within which the rights in question could be exercised. The doubts felt, in consequence of the adoption of such regulations, by certain States which would be prohibited from satisfying needs arising subsequently outside the zone of dominion might be dispelled by the following considerations: In most cases the common interests of several States would be at stake and these might be satisfied by a revision of the Convention. But even in the case of a need felt by a single State, the State in question might, as an exceptional measure, be authorised to apply to an international tribunal for permission to exercise the right in question. Such a grant to a particular State of rights which would further restrict the common freedom of the sea would be in accord with the legal conception which is now accepted, that the open sea is not *res nullius* but *res communis*. This conception may be regarded as the nucleus of the idea of an organised dominion of the community of nations over the sea.

See POLITIS, minutes of the meeting of the Institut de Droit international, August 1st, 1925: "Contrairement à l'avis exprimé précédemment, M. Politis estima qu'il y a grand

intérêt à prendre parti dans la question de savoir si la mer est *res nullius* ou *res communis*. D'après lui, c'est la seconde solution qui représente aujourd'hui la vérité scientifique. L'idée de la *res nullius* était jadis en harmonie avec a conception négative de la liberté. Elle ne s'accorde plus avec la conception positive de la solidarité, qui est à la base des relations internationales modernes . . . La nécessité d'un contrôle international sur tous les usages de la mer, même, s'il a lieu, près des côtes, pénètre tous les jours davantage dans les habitudes et dans la conscience des peuples."

Such a grant would create special rights for the satisfaction of the newly felt needs of a riparian State outside the fixed zone. It would imply the existence of certain organising institutions to which we shall refer later.

The category of rights to be recognised in the second zone on the basis of existing usage should include police measures to prevent the possibility of prohibited military exercises by another State, and measures of Customs and sanitary control. Exclusive economic rights of user outside the six-mile zone are not claimed to-day by any State. It should be forbidden to grant such rights in future, even if it is desired to enable riparian States in exceptional cases to obtain permission to exercise new rights in the second zone.

In addition to these arguments, which all deal with the limit of the exercise of rights by the riparian State in the domain of the sea, in so far as such limit is fixed on the side of the high seas, mention should also be made of the line which limits the rights of dominion of the riparian State on the landward side. This question is much simpler. The general practice of the States, all projects of codification and the prevailing doctrine agree in considering that this line should be low-water mark along the whole of the coast.

See BJÖRKSTEN, *op. cit.*, p. 91; FAUCHILLE, *op. cit.*, pp. 195 *et seq.* (With regard to special configurations, see pp. 11 *et seq.*)

Consequently, Article 2 of the Convention will read as follows:

"*Extent of the rights of the riparian State.*

"*Article* 2.—The zone of the coastal sea shall extend for six marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast.

"The rights of other States which have been exercised by virtue of the common right of user of the high seas or of special treaties shall not be affected. States may exercise their rights of dominion by virtue of usage, and within the limits of such usage, beyond the zone of dominion in the following domains: police measures to prevent the possibility of military exercises being carried out by other States, and measures of Customs and sanitary control. Other rights beyond the zone of dominion may only be accorded to the riparian State by the body mentioned in Article 3 if they are demonstrated to be urgently necessary. Such grant shall in no case include rights of exclusive economic user outside the territorial sea."

*IV. International Waters Office*

If the rules proposed by us be put into operation by Convention, there will still be very varied forms of legal rights in the parts of the sea near the coast, for, apart from the fundamental rights of common user in respect of the territorial sea, to which we shall return later, third States will be able to exercise various rights in respect of the territorial sea solely by virtue of the fact that they exercised such rights before the conclusion of the Convention in consequence of the common usage of the high seas or of special treaties. Again, riparian States could exercise special rights in waters which do not, strictly speaking, form part of the territorial sea. The legal position in this respect cannot be changed. The present state of affairs will continue. It is therefore necessary to prevent, at any rate for the future, the possibility of conflicts arising as a result of this confused legal position. This is not, we think, in any way impossible. All the questions which may arise can be reduced to this one question: To what point does the common right of user of the sea extend, and to what point do the rights of particular States, especially the riparian State, extend? This question of the limitation of the common use of waters is not new to jurists. It arises also in the interior of States, and civilised States have endeavoured to solve it by establishing registers of special waters, sometimes in connection with the establishment of land registers and sometimes separately.

These documents, which are published and controlled by State authorities, contain a record of all special rights restricting common use; and these records create the law for the future. All that is necessary is to transplant this institution to the domain of legal rights which restrict the common use of waters in the neighbourhood of riparian States.

International unions with special offices were established for many administrative purposes even before the formation of the League of Nations. The duty of an International Waters Office would be to compile a register of the rights which particularly States consider they possess in the fixed zone of foreign riparian States, or which such riparian States consider that they possess outside their own fixed zone.

In the case of rights arising out of the traditional common use of waters not hitherto included in the fixed zone, the registration of such rights in favour of any State will suffice to ensure their enjoyment in future by all other States. In the case, however, of rights arising from special treaties, such rights can, naturally, only be claimed by the States signatory to these treaties, and only provided that they register them within a fixed time-limit. A time-limit must also be fixed for the registration of rights which the riparian State claims to exercise outside the fixed zone of the territorial sea. The legal instruments concerned must be presented and registered. The onus of proof will be upon the State applying for the registration of a right in its favour. Applications must be communicated to all the States signatory to the Convention; they may be opposed within a time-limit to be fixed. If an

application is opposed, the question will be decided, in the first instance, by a mixed commission of experts and jurists. Appeal lies from decisions of this commission to the Permanent Court of International Justice. All States will be informed of the registration of a right. The register will be published.

The same procedure would apply in cases in which a State claims to have an urgent and new need outside the sphere of its dominion over the territorial sea. It must apply to the International Waters Office, which may only grant a right after publication of the application and provided that it is not opposed. In the event of opposition, the question goes before a mixed commission, before which the State claiming the right must prove that it cannot otherwise protect the interests affected. In this case also, both parties have a right of appeal to the Permanent Court of International Justice.

The International Waters Office will also be responsible for publishing maritime charts showing the zones of the territorial sea.

Article 3 of the Convention ought therefore to read as follows:

"*International Waters Office and registration in the International Waters Register.*

"*Article* 3.—The States signatory to the Convention undertake to establish an International Waters Office.

"The duty of this Office is to compile a register of rights possessed by the different States in the fixed zone of foreign riparian States, or by the riparian States themselves outside the fixed zone.

"The registration of a right in the International Waters Register kept by the International Waters Office in favour of any State in a foreign territorial sea sha'll be in favour of all States, if such right is founded upon common usage.

"A time-limit of . . . shall be fixed by the International Waters Office for the submission of all applications for such rights, as also for rights claimed by a riparian State outside its fixed zone by virtue of usage.

"The relevant legal instruments must be presented and registered. The onus of proof shall be upon the State applying for registration of a right in its favour. Applications must be communicated to all the States parties to the Convention.

"Applications may be opposed within a time-limit to be fixed. If an application is opposed, the question is decided, in the first instance, by a mixed commission of experts and jurists. Appeal lies from decisions of this commission to the Permanent Court of International Justice. All States shall be informed of the registration of a right. The Register shall be published.

"The same procedure shall apply in cases in which a State claims to have an urgent new need outside the sphere of its dominion over the territorial sea. It must apply to the International Waters Office, which

may only grant a right after publication of the application and provided that it is not opposed. In the event of opposition, the question shall go before a mixed commission, before which the State claiming the right must prove that it cannot otherwise protect the interests affected. In this case also, appeal lies to the Permanent Court of International Justice.

"The International Waters Office shall also be responsible for publishing maritime charts showing the zones of the territorial sea."

### *V. Bays*

With regard to bays, the following dispositions are found in internal legislation, in international treaties, in the codification projects, and in international arbitration awards.

"Nach dem Vorbild eines ältern Englisch-Französischen Vertrages über die Kanal-Fischerei, eines französischen Reglements vom 2. August 1839 und vom 24. Mai 1843, eines französischen Fischerei-Gesetzes vom 1. März 1888, einer Bekanntmachung des britischen Handels-Amtes vom November 1868 enthaltend eine Anerkennung der Gebiets-Hoheit des norddeutschen Bundes in seinen Buchten, wurde im Haager Vertrag vom 1883 über die Fischerei in der Nordsee folgende Bestimmung aufgenommen: Artikel 2, Absatz 2: 'Pour les baies, le rayon de trois milles sera mesuré à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas dix miles'." (SCHÜCKING, "Das Küstenmeer im internationalen Rechte," p. 22.)

"Norwegen gehört auch zu denjenigen Staaten, welche grössere Buchten beanspruchen. Von jeher besteht solcher Anspruch hinsichtlich der Vestfjord. Die Verordnung vom 17. Dezember 1896 verbot unter anderm den Walfang im Varanger Fjord und innerhalb einer Linie gezogen von Kiberg bis zur Mündung der Gräuss-Jakobselv, und bei Thiberg noch innerhalb einer geographischen Meile und Ufer." (BJÖRKSTEN, *op. cit.*, p. 83.)

"Auch Russland hat Souveränität über grössere Meerbusen beansprucht. Solange Finnland und die Baltischen Staaten zu Russland gehörten, wurde der finnische Meerbusen als ein russischen Eigengewässer behandelt. Der Tages-Befehl der Ost-See-Flotte vom 24. Juni (alten Stils) 1914 verordnete, dass der finnische Meerbusen dür die Dauer der Kriegs-Operationen für die Schifffahrt geschlossen sein solle. Im Jahre 1896 verbot Russland das Fischen mit Schleppnetzen im Weissen Meer, ein britischer 'Trawler' wurde dort im Jahre 1910 beschlagnahmt. In dem im Sommer 1924 unterzeichneten Abkommen zwischen Russland und Gross-Britannien wurde den Russen das ausschliessliche Recht zum Fischfang in diesem Meer südlich der Parallele 67 Grad 40 Sekunden zugestanden." (BJÖRKSTEN, p. 83.)

"In den beiden Englisch-Französischen Fischerei-Zonen vom 3 SM., gemäss den Verträgen von 1839 und 1867, wird als Grundlinie eine Linie festgestellt, die von dem einen Mündungsufer gezogen wird, in einer solchen Bucht deren Mündung nicht breiter als 10 SM. ist." (BJÖRKSTEN, *op. cit.*, p. 84.)

"Lord Fitzmaurice a déclaré, le 21 février 1907, à la Chambre des Lords d'Angleterre, qu'on ne pouvait comprendre comme territoriales que les baies dont l'entrée ne dépasse pas six milles; c'est aussi l'opinion qu'a émise, le 6 juin 1870, lord Granville, secrétaire d'Etat britannique pour les Affaires étrangères. On la trouve encore soutenue aux Etats-Unis par le juge Forster, dans la question des 'Halifax Fisheries' et, en 1890, par le juge Blatchford, au nom de la Cour suprême des Etats-Unis, dans l'affaire *Manchester* v. *Massachusetts*. (FAUCHILLE, *op. cit.*, p. 373.) La Cour d'arbitrage de La Haye, dans sa sentence arbitrale du 7 septembre 1910, rendue au sujet de l'affaire des pêcheries des côtes septentrionales de l'Atlantique entre les Etats-Unis et la Grande-Bretagne, après avoir déclaré que les baies

territoriales s'étendent aussi loin qu'elles conservent la configuration et les caractéristiques d'une baie, a refusé de considérer comme un principe rigoureux de droit international s'imposant aux Etats la règle de la territorialité des baies dont l'ouverture n'excède pas six milles et a recommandé aux parties litigieuses d'admettre comme principe, sauf en ce qui concerne certaines baies qu'elle énumère et pour lesquelles elle adopte de plus longues distances, de ne regarder comme territoriales que les baies dont l'entrée ne dépasse pas dix milles. Un des arbitres, le Dr. Drago, émit une opinion dissidente: Après avoir soutenu qu'il existait une classe de baies, les baies historiques qui, quelle que soit leur largeur, sont territoriales, il déclara que, pour les autres, c'est-à-dire pour les baies communes et ordinaires, il ne pouvait pas y avoir de règles générales et que le principe à poser devait être tiré dans chaque cas de la pratique suivie par la nation intéressée." (FAUCHILLE, p. 374.)

See also other cases of international practice mentioned by FAUCHILLE, *op. cit.*, pp. 374 *et seq.*

As regards practice, see RAESTAD, *op. cit.*, pp. 146 *et seq.*: "Quant à l'étendue des baies territoriales, la pratique, telle qu'elle s'est affirmée dans les conventions de pêche, a dégagé une tendance marquée vers la limitation des prétentions quelquefois exagérées à l'empire des baies. Mais la limitation arbitraire introduite par les dites conventions—la ligne de dix milles—n'a pas réussi à anéantir la territorialité des baies appelées historiques." *Cf.* also SALMOND, "Territorial Waters," in *The New Quarterly Review.*

Institut de Droit international: Resolution of 1894, Article 3: "Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de 12 milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande."

In 1895, the International Law Association fixed the width at ten marine miles.

*Cf.* OPPENHEIM, in the *Annuaire de l'Institut de Droit international* for 1913, pp. 406 *et seq.*: "La rédaction de cet article (Article 3) a besoin d'être modifiée, puisque la distinction nécessaire n'y est pas faite entre les baies qui sont environnées de terres d'un seul Etat et les autres. Il est universellement reconnu que les baies qui sont environnées des terres de deux ou plusieurs Etats, quelque étroite que soit leur embouchure, ne sont pas territoriales, mais forment partie de la haute mer. Pour cette raison, je propose le texte suivant pour l'article 3: 'Pour les baies qui sont environnées des terres de deux ou plusieurs Etats, la mer territoriale suit les sinuosités de la côte. Pour les baies qui sont environnées de terres d'un seul Etat, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée . . .'

"Quant à déterminer combien l'embouchure des baies doit être étroite, afin qu'on puisse les considérer comme territoriales, il est impossible, à mon avis, de poser d'autres règles que celle-ci: 'L'ouverture vers la mer doit être assez étroite pour être commandée par des batteries de la côte.' Toutefois, si l'Institut était d'avis de poser la règle que l'ouverture ne doit pas être plus large que 12 milles, je n'y ferais pas d'objections, car la portée du canon augmente constamment."

Project STORNY, Article 6: "Dans les baies, golfes, criques et anses de la côte, la mer territoriale suivra en général, la configuration de celle-ci, sauf qu'elle doit être comptée à partir d'une ligne droite tirée à travers la baie, golfe, crique ou anse, dans la partie la plus rapprochée de l'entrée de la mer ou la séparation des côtes soit telle que les deux zones de mer territoriale déterminées chacune et séparément, conformément au critérium du présent projet de convention, se trouvent en effet pratiquement unies." Article 7: "L'Etat pourra comprendre dans les limites de la mer territoriale les estuaires, golfes, baies ou parties de la mer adjacente où un usage continu et séculaire aura consacré sa juridiction, ou qui, dans le cas où ces précédents n'existaient pas, seraient d'une nécessité inéluctable selon le concept de l'article 2."

Project of the American Institute of International Law, Article 4, paragraph 1: "For bays extending into the territory of a single American Republic, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the

bay at the point nearest the opening into the sea where the two coasts of the bay are separated by a distance of . . . marine miles, unless a greater width shall have been sanctioned by continued and well-established usage."

The facts and opinions which have been quoted give an idea of the variety of usages and of the multiplicity of conceptions. The impression which the table creates proves once again the necessity for codification. If codification is to be effective, due consideration must be shown in this matter also to the various conceptions which are entertained. Such a method demands that a clear distinction should be drawn, on the basis of the usages in force, between bays to which the rules of ordinary international law should be applied, even if these are not at present beyond doubt, and the bays in respect of which a particular State has claimed to occupy a special legal position (historical bays).

Let us begin by examining the former. These may be divided into two categories: (1) bays which are bordered by the territory of a single State; (2) bays which are bordered by the territory of two or more States.

See, as regards international practice in relation to the second group of bays, FAUCHILLE, *op. cit.*, pp. 384 *et seq.* Project of the American Institute of International Law, Article 4: "In the case of an international bay whose coasts belong to two or more different countries, the territorial sea follows the sinuosities of the coast, unless there exists a convention to the contrary."

As regards bays which are bordered by the territory of a single State, there is general agreement on the point that the entrance to the bay on the side of the opening towards the sea must not exceed a certain width. The waters of these bays are not regarded as territorial waters but as internal waters. See Sir Cecil HURST, "The Territoriality of Bays," *British Year-Book of International Law*, 1922–23, pp. 42 *et seq.*

Divergencies of opinion only arise on the following question: How narrow must the entrance to the bay be in order that this rule may be applicable? If we adopt a six-marine-mile zone for the territorial sea, it would seem logical to apply the rule in question to all bays whose imaginary entrance line does not exceed 12 marine miles in width, for the riparian State dominates on both sides all the part nearest to the opening towards the sea. This being so, it would seem logical to assign all the waters within the bay to the riparian State, but not *qua* territorial sea. We must recognise the more absolute right of dominion which a State exercises over its internal waters. For bays which are bordered by a single State, but the entrance to which exceeds 12 miles in width, it must be admitted in case of doubt, *i.e.*, if no historical right can be upheld in respect of the territorial sea, that the territorial sea is governed by the general rule (*i.e.*, that it follows the sinuosities of the coast).

The same rule of law is applicable to bays whose shores belong to various States, without reference to the width of the bay. All the recent codification projects are in agreement on this point.

There remains to be considered the legal status of bays which are only bordered by a single State and which are subject for historical reasons to claims of exclusive right of user. As we have already observed, such a right must be recognised on principle. The position is an anomalous one, and for that reason such rights must be dealt with in the same way as the rights to be exercised outside the fixed zone of the territorial sea by particular States. At the same time, it must not be forgotten that in the case of bays such rights lead to the recognition of a general right of dominion over the waters in question (the internal waters of the bay) and not merely to the exercise of certain special rights of dominion (such as, for example, the right of sanitary or Customs control).

As these historical rights restrict in a special manner the common use of the sea, it is necessary that they should be definitely formulated in an international convention, as was proposed in respect of the rights of the riparian State outside the territorial sea. This should be done under the same conditions as in the case of the rights enumerated in Article 3, *i.e.*, the rights in question should be registered in the International Waters Register. It should be made impossible for such rights to be acquired in the future.

Article 4 of the Convention should therefore read as follows:

"*Bays.*

"*Article* 4.—In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea, where the distance between the two shores of the bay is 12 marine miles, unless a greater distance has been established by continuous and immemorial usage.

"In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.

"As regards the recognition of rights which are in contradiction with the tenor of the general rules, the provisions of Article 3 concerning presentation and registration in the International Waters Register shall be applicable. It shall not be possible to acquire such rights in the future."

### *VI. Islands*

Special difficulties may arise in cases where—as frequently happens—there is an island or a number of islands situated off a coast. Is the zone of the territorial sea to be measured from the coast of the mainland or from the coast of the island on the side of the high seas? We find material for the solution of this question in national legislations, in the practice of States and in the codification projects.

"Nach dem Nordsee-Abkommen soll die 3-Meilen-Grenze von der niedrigen Wasser-Linie und den 'Iles et des bancs qui en dépendent' gerechnet werden. Der Ausschuss der II.

Friedens-Konferenz, dem die Ausarbeitung des Entwurfes eines Minen-Abkommens überlassen wurde, schlug vor, dass die 3-Meilen-Grenze von der Niedrig-Wasser-Linie wie 'des iles et des ilots qui en dépendent' gerechnet werden solle. Die Veränderung des Ausdruckes des Nordsee-Abkommens wurde in folgender Weise begründet:

"'Aux embouchures des grands fleuves et, à vrai dire, partout dans le monde . . . on trouve des récifs et des bancs de sable à une distance beaucoup supérieure à trois milles de la côte; si l'on ne rend pas le texte plus précis, en supprimant la mention des bancs, il sera loisible d'étendre l'application de l'article 2 à ces bancs et ces récifs entièrement ou en partie submergés, et le principe adopté, qui interdit, en règle générale, de placer des mines en dehors des eaux côtières, pourra être compromis.'

"Die französische Verordnung vom 18. Oktober 1912, die die Neutralitäts-Grenze Frankreichs auf 6 SM. feststellte, bestimmt, dass sie von der Küste 'et les bancs découvrants qui en dépendent, ainsi qu'autour du balisage fixe qui détermine la limite des bancs non découvrants' zu rechnen sei.

"Das Aaland-Abkommen bestimmt (Art. 2, § 11): 'Les eaux territoriales des îles d'Aaland sont considérées comme s'étendant à une distance de trois milles marins de la laisse de basse mer des iles, îlots et récifs non constamment submergés.'

"Das Dekret des Dänisch-Norwegischen Königs von 1745 rechnete die 4-Meilen-Grenze von den Untiefen und Schären ausserhalb der Norwegischen Küste. Das Gesetz vom 14. Juli 1922, welches die Zoll-Grenze Norwegens auf 10 SM. feststellte, hat eine neue Formulierung eingeführt, indem as bestimmt, dass diese in einer Entfernung von 10 SM. ausserhalb der Inseln und Felseninseln, die nicht ständig von dem Meere überspült werden, liegen solle."

"Nach Artikel 3 des Dorpater Friedensvertrages zwischen Soviet-Russland und Finland bestimmt sich die Ausdehnung der Territorial-Gewässer Finnlands im finnischen Meerbusen 'à partir de la côte ou à partir du dernier îlot ou rocher dépassant le niveau de la mer.' Nach Anmerkung 1 des Artikel 3 des Vertrages werden die auf den beiden russischen Seekarten gezogene Grenze für authentisch erklärt." (BJÖRKSTEN, *op. cit.*, pp. 85 *et seq.*)

Under the terms of the peace treaties which put an end to the world war of 1914–19, the maritime frontiers include, in principle, islands and islets situated less than three miles from the coast. This is laid down in particular in Article 30 of the Treaty of Sèvres with Turkey; and the same provision is found in Article 6 of the Treaty of Lausanne of July 24th, 1923.

The rules issued by the Institut de Droit international in 1894 merely state that the territorial sea extends for six marine miles from low-water mark along the whole of the coast; the Rapporteur, Mr. Barclay, declared, however, that the expression "coast" included the coast of the islands. (See the *Annuaire de l'Institut de Droit international*, Volume 12, p. 126, and Volume 13, pp. 293, 298 and 329.)

American Institute of International Law: Article 5: "With regard to islands and keys possessed by an American Republic outside or within the limits of its territorial sea, each shall be surrounded by a zone of territorial sea coming within the definition of Article 3. In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial sea referred to in Article 3 shall be measured from the islands farthest from the centre of the archipelago."

In this question also our task is to define a law which is in process of formation, for already we are able to refer to facts and doctrines based upon the conception of a uniform law.

As regards the doctrine, see BJÖRKSTEN, *op. cit.*, pp. 86 *et seq.*

The zone of the territorial sea is measured not from the mainland but from the coast of the islands off the mainland. This rule can only be maintained on the twofold hypothesis that we are dealing with islands which are not always completely submerged by the sea and that the islands in question

are not so far distant from the coast that they would be outside the zone of the territorial sea if the latter were measured from the coast of the mainland. Agglomerations of islands situated off the coast must be regarded as units, and consequently the island which is situated farthest from the centre of the agglomeration of islands in the direction of the high seas is taken as the basis for measuring the zone of the territorial sea.

As regards islands which are artificially created by anchorage to the bed of the sea, and which have no solid connection with the bed of the sea, but which are employed for the establishment of a firm foundation, *e.g.*, for enterprises designed to facilitate aerial navigation, we must be guided by the view that such an enterprise cannot claim that a special zone of territorial sea is constituted round such artificial island. Such fictitious islands must be assimilated to vessels voyaging on the high seas.

It has been discussed whether a zone of territorial sea should be established around artificial islands which are actually connected with the bottom, such as islands designed to carry light-houses; there is no uniform legal doctrine as regards such islands. This is evident from the fact that two such eminent authorities as the English judge, Lord Russell, and the jurist, M. L. Oppenheim, have expressed divergent views.

Lord RUSSELL states: "If a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it." OPPENHEIM says: "Il n'y a pas de droits desouveraineté sur une zone de la mer qui baigne les phares."

We must also abandon the attempt to settle the difficulties arising out of the presence of permanent ice near the coast. (For international practice, see FAUCHILLE, *op. cit.*, page 203.)

The cases mentioned by Fauchille (Spitzbergen, Alaska) are not sufficient to enable us at the present time to claim that there is a definite legal conception which could be used as a basis for a codified rule. No project of codification refers to the matter.

Article 5 of the Convention would therefore read as follows:

"*Islands.*

"*Article* 5.—If there are natural islands, not continuously submerged, situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself."

### *VII. Common Land Frontiers*

Difficulties may arise with regard to the fixing of the frontier of the territorial sea at places where two States have a common land frontier meeting a particular coast. The question is whether we should regard as the limit

between the two territorial seas an imaginary line constituting the prolongation of the land frontier between the two States in the same direction towards the sea or if a line should merely be drawn at 90° to constitute the frontier line between the two territorial seas at the point on the coast where the territories of the two States join.

In the case of existing States, the matter will be settled by historical considerations.

In the event of a political change in the existing frontiers between riparian States, it would be advisable to establish special rules in each case having regard to the special geographical circumstances which have led to the fixing of a new frontier. It would be better to arrange for the conclusion of a special agreement between the States concerned, or for the settlement of the matter by arbitration or an ordinary tribunal, than to lay down an immutable principle. For example, a similar frontier dispute between Sweden and Norway was settled by an award of the Permanent Arbitration Court at The Hague in 1909, while on the occasion of the separation of Finland from Soviet Russia the matter was settled by contractual agreement.

See STRUPP: "Der Schwedisch-Norwegische Grenzstreit," quoted by SCHÜCKING in *Das Werk vom Haag*, Series 2, Volume 1, pp. 47 *et seq.*; BJÖRKSTEN, *op. cit.*, pp. 93 *et seq.*

### *VIII. Straits*

There remains to be considered, as we have already observed, the application to narrow straits of the rules of law concerning territorial waters. Although the theory of territorial waters is not without influence on the question of artificial maritime channels, these can clearly be eliminated, as they are not included in the definition of the subject under discussion by the Rapporteur of the Second Sub-Committee.

As regards straits, we are not called upon to consider those which are not subject to conventional regulation. Further, we are only called upon to consider straits the entrance to which is not more than 12 marine miles in width, for, in the case of wider straits, the ordinary principles of territorial waters apply. This is so whether the straits which are more than 12 miles wide are in the possession of several States or of a single State. Difficulties only arise where, although the strait is less than 12 marine miles wide at the entrance, it exceeds this limit in its subsequent course.

In this case it will be necessary to distinguish according as the strait is surrounded by the territory of several States or only by the territory of one State. In the former event, the principles concerning territorial waters will, of course, be applicable; in the latter, legal practice is based on the idea that, if the entrance and the issue of a strait less than 12 marine miles wide belong to the riparian State, all the waters of the strait must belong to that State, in accordance with the principle governing bays.

It seems to us of capital importance that this principle should be codified.

Likewise, the following principle: In the case of a strait less than 12

marine miles wide, bordered by several riparian States, difficulties arise with regard to the fixing of the boundary of the territorial waters within the strait; for, if it were decided to assign to each riparian State the ordinary six marine miles, there would be frequent disputes as to the right of dominion over the soil. Different solutions are possible. International practice, doctrine and codification projects have dealt with the question on various occasions.

For international practice and doctrine, see the well-documented work of GUERRA, "Les eaux territoriales dans les détroits, spécialement dans les détroits peu larges," *Revue générale de Droit international public*, 1924, pp. 232 *et seq.*

Institut de Droit international: Article 10 of the project of 1894: "Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas 12 milles, sauf les modifications et distinctions suivantes: les détroits dont les côtes appartiennent à des Etats différents font partie de la mer territoriale des Etats riverains qui y exerceront leur souveraineté jusqu'à la ligne médiane; les détroits dont les côtes appartiennent au même Etat et qui sont indispensables aux communications maritimes entre deux ou plusieurs Etats autres que l'Etat riverain font toujours partie de la mer territoriale du riverain, quel que soit le rapprochement des côtes . . ."

Article 11: "Le régime des détroits actuellement soumis à des conventions ou usages spéciaux demeure réservé."

STORNY project: Article 8: "Dans les détroits s'appliqueront les mêmes règles que les précédentes. Si les deux côtes appartiennent à un même Etat et si la largeur du détroit est inférieure ou pratiquement égale au total de l'étendue qui correspond aux eaux juridictionnelles des côtes, toute la largeur du détroit fait partie de la mer territoriale. Si les côtes, dans ce cas, appartenaient à deux ou plusieurs Etats, la séparation des juridictions serait fixée par convention entre les dits Etats riverains."

Project of the American Institute of International Law. In the American project questions concerning straits are not dealt with in the section on the territorial sea but in a special section entitled: "Straits and Natural Channels connecting two Seas." According to Article 20 of this section, the principles governing the territorial sea (Articles 6–11) are applicable to straits and channels.

Article 17: "In straits and natural channels connecting two open seas and separating two or more Republics—either on two continents, a continent and an island, or two islands—the limit of the territorial waters of each Republic shall be the middle of the strait or channel separating them, if the width of this is less than . . . miles. In such case, each one of the said Republics has within its own zone the right of sovereignty and jurisdiction which it possesses over its territorial sea."

Article 18: "If the strait or channel is more than . . . miles in width, the right of jurisdiction of the riparian American Republics shall extend, in the case of each of them, for . . . miles from their respective coasts. Outside this limit navigation shall be entirely free, but only if each entrance to the strait is more than . . . miles in width; otherwise navigation in the said zone shall be subject to the regulations of the riparian Republics. As regards the installations mentioned in Article 15, these may only be established by the riparian Republics by common agreement."

Article 19: "If the strait or channel separates two coasts of the same Republic, the said Republic shall be the sole proprietor and navigation shall be subject to its regulations."

The legal view most generally favoured fixes as the limit the middle of the strait.

A rule of law not without practical importance which has been established as regards rights in straits serving as a passage to open seas is that such a

strait may never be closed. This rule is in accordance with the idea that a riparian State is not entitled in time of war completely to close its territorial sea.

See SCHÜCKING: "Die Verwendung von Minen im Seekrieg," *Zeitschrift für internationales Recht*, 1906, pp. 121 *et seq.*

This involves matters concerning belligerent rights which are outside the scope of the present report. We consider, therefore, that we can leave on one side the application of the doctrine of belligerent rights to measures of constraint applied under peace-time regulations, such, for example, as the pacific blockade of a riparian State by other States.

For this reason, the Convention need only contain the following disposition with regard to the question of straits:

"*Straits.*

"*Article* 6.—The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State the sea shall be territorial even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait.

"Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line."

### *IX. Pacific Passage*

The doctrine which we have adopted, based upon the fundamental right of dominion of the riparian State over the territorial sea, has never denied that all States possess rights of common user over the territorial sea, the most important of which is the right of free passage. The question to what extent, in the event of war, the rights of common user possessed by States over foreign territorial seas can be restricted by the rights of belligerents and neutrals need not be examined here.

The right of free passage is frequently recognised in national legislations and in conventional practice.

We may refer in this connection to a decree issued by France on May 26th, 1913, for the purpose of determining in time of war the conditions of access and sojourn for vessels other than French warships in anchorages and harbours along the coast (Article 2). In Italy, it is expressly declared, in a law dated June 16th, 1912, with regard to the regulation of the transit and anchorage of merchant vessels along the coasts of a State, that "the transit and sojourn of national or foreign merchant vessels may be prohibited at any time—in time of peace as well as in time of war—and at any place whatever, whether internal or external, in the seas of the State, if this is considered necessary in the interests of national defence."

We find the same doctrine in the United States:

"We do not contest the right of vessels of other nations," wrote Secretary Bayard on May 28th, 1886, in a note to Mr. Manning, Secretary to the Treasury, "to pass freely through the zone of the territorial sea, provided that in so doing they do not become a source of peril for the shore or give rise to suspicions of smuggling."

The Treaties of Peace with Germany, June 28th, 1919 (Article 321), of Neuilly-sur-Seine with Bulgaria, November 27th, 1919 (Article 212), and of Sèvres with Turkey, August 10th, 1920 (Article 328), after stipulating that Germany, Bulgaria and Turkey undertake respectively to grant freedom of transit through their territories, on the routes most convenient for international transit, to vessels coming from or going to territories of any of the Allied and Associated Powers, declare that "for this purpose the crossing of territorial waters shall be allowed."

In Conventions concluded on June 28th, September 10th and December 9th, 1919, with the Principal Allied and Associated Powers, Poland (Article 17), the Kingdom of the Serbs, Croats and Slovenes (Article 15) and Roumania also undertook to grant freedom of communication and transit to those Powers across their "territorial waters."

A similar provision is also to be found in the Convention of April 21st, 1921, regulating as regards transit the relations between Germany, Poland and the Free City of Danzig (Article 1).

Finally, the same principle is formulated collectively in the Convention on Freedom of Transit signed at Barcelona on April 20th, 1921. It was stated in the draft of this Convention that "transit across territorial waters shall be free" (Article 2), and in Article 2 of the final text of the annexed Statute that, "in order to ensure the application of the provisions of this article (concerning free transit), the Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters." The rule thus adopted—which clearly does not concern warships, since the Convention only relates to transit considered in its commercial aspect—is to "continue in force in time of war so far as such rights and duties (the rights and duties of belligerents and neutrals) permit." Its adoption, however, is without prejudice to the rights of sovereignty or authority of the Contracting States over routes available for transit (*cf.* preamble to the Convention), and it may be suspended on grounds of public health or security, or in case of an emergency affecting the safety of the State or the vital interests of the country (Articles 5 and 7). (FAUCHILLE, see pp. 1090 *et seq.* and pp. 169 *et seq.*)

Article 32, Section 6, Paragraph 1, of the Peace Treaty of Dorpat grants to merchant vessels the right of free passage across the waters of the Contracting Parties. Freedom of passage across the territorial waters is expressly provided for in the Treaty of Commerce and Navigation between Great Britain and Finland dated December 14th, 1923 (Article 11, Paragraph 2).

## All the codification projects admit the right of free passage.

Institut de Droit international: Article 1: "L'Etat a un droit de souveraineté sur une zone qui baigne la côte, sauf le droit de passage inoffensif réservé à l'article 5." Article 5: "Tous les navires, sans distinction, ont le droit de passage inoffensif par la mer territoriale, sauf le droit des belligérants de réglementer et, dans un but de défense, de barrer le passage dans ladite mer pour tous navires et sauf le droit des neutres de réglementer le passage dans ladite mer pour les navires de guerre de toutes nationalités."

*Cf.* Article 10 of the Hague Convention of 1907 on the rights and duties of neutrals: "La neutralité d'une Puissance n'est pas compromise par le simple passage dans ses eaux territoriales des navires et des prises des belligérants."

The projects of the International Law Association contain the same provisions as the project of the Institut de Droit international.

Article 7 of the project of the American Institute of International Law reads as follows: "Merchant vessels of all countries may pass freely through the territorial sea, subject to the laws and regulations of the Republic to which the said sea belongs. Neither warships nor merchant vessels can sojourn in the territorial sea, or fish there, or commit any act involving the violation of those laws and regulations, without the authorisation of the said Republics."

Article 12: "Subject to the preceding restrictions, transit through this zone shall be absolutely free, as on the high sea."

In view of this general legal agreement as to the existence of the right of free passage, it might be held that a codification of the rule is superfluous, were it not that we are dealing with a principle the consequences of which may vary considerably in detail and may give rise to doubts and disputes. In the first place, we must decide whether in applying the rule of free passage a distinction is to be made between merchant vessels and warships. It has been pointed out in the doctrine on the subject that a right of free passage for warships can only be presumed and that the riparian State may arbitrarily prohibit the passage of warships through its territorial sea by the same right as it forbids access to its ports and internal waters. This view is, for example, expressed by the eminent professor, M. POLITIS.

See POLITIS, in the "Chronique des faits internationaux," *Revue générale de Droit international public*, Vol. 8, pp. 341 *et seq.*: "En temps de paix, il est admis comme principe général que l'accès des eaux territoriales ou nationales d'un Etat est présumé libre pour les navires de guerre étrangers. Ce principe constitue une dérogation à la règle qu'une force armée étrangère ne peut, sans l'autorisation expresse du gouvernement, pénétrer sur le territoire. Aussi doit-il être restreint aux termes de la convention ou dans les limites de la coutume qu'il a établie. Or, la coutume admet que le libre accès des navires de guerre étrangers est basé sur la concession présumée du souverain et cette présomption doit, par conséquent, disparaître toutes les fois que l'intention contraire est manifestée. Tout Etat a le droit de fermer aux navires de guerre étrangers ses ports . . . Aussi bien la mesure est-elle exceptionnelle, la règle la plus généralement suivie étant celle de la liberté moyennant certaines conditions."

In connection with this opinion it should be pointed out that such a restriction of the right of free passage to merchant vessels alone is foreign to international law. At the same time, the project of the American Institute of International Law gives rise to doubt on the subject, inasmuch as it refers only to *merchant* vessels of all countries as being entitled to pass freely through territorial seas.

Of course, we are dealing only with "pacific" passage. It is much more natural to doubt the pacific character of the passage in the case of a large war fleet which enters the territorial sea of a foreign State at a time of general political tension than in the case of an ordinary merchant vessel. This does not, however, affect in any way the legal principle that even warships possess a right of common user in respect of foreign territorial waters which cannot be restricted arbitrarily, but only for reasons of national self-preservation.

It is of importance that this principle should be codified, in order that all vessels without distinction may be assured the right of free pacific passage. This right should even be extended to submarines, though in their case it has often been disputed when occasion has arisen.

Sir Thomas Barclay, in his 1925 Preliminary Report on the Revision of the Resolutions adopted by the Institut de Droit international regarding Territorial Waters, writes (page 4): "En ce qui concerne le droit de passage inoffensif, faut-il le limiter à la navigation sur la surface? En d'autres termes, y a-t-il lieu d'interdire le passage, même inoffensif, de vaisseaux sous-marins submergés et ainsi invisibles de la rive? La question me paraît très discutable, car cette navigation échapperait au contrôle de la police côtière. Ainsi, le sous-

marin pourrait endommager des câbles sans être vu. Il est possible, d'ailleurs, que la pêche pourrait être exercée par des bateaux submersibles . . ."

A very reasonable attitude, however, was adopted towards the regulation of this question by the eminent Professor Diena, who proposed that submarine vessels should be required to pass through territorial waters on the surface (Minutes of the meeting of the Institut de Droit international, August 1st, 1925).

Without this safeguard, the riparian State could not be certain whether the passage was really pacific.

So far as concerns the right of free passage, no distinction whatever should be drawn between vessels coming from another territorial sea, or from the high seas, or proceeding from an international river to the high seas in the course of their voyages. In the last-mentioned case, the right of free passage through territorial waters is also recognised by the Barcelona Statute of April 20th, 1921, on the Régime of Navigable Waterways of International Concern. In this case, the merchant ships in question would, on leaving the international river and entering the territorial sea, become subject to the rules governing the rights of merchant vessels in the territorial sea, for the Statute on the Régime of Navigable Waterways of International Concern recognises only the right of free access to the sea.

Some uncertainty might arise as to vessels sojourning in a foreign territorial sea. Accordingly, the American Institute of International Law thought it necessary to include in its project the following clause: "Neither warships nor merchant vessels can sojourn in the territorial sea without the authorisation of the said Republics."

In our opinion, such a rule is not necessary in so far as the vessels are sojourning in the foreign territorial sea with the intention of proceeding further: where, for example, a sailing vessel is awaiting favourable weather, or a steamship is unable to continue its voyage pending urgent repairs.

A right of free passage must cover a sojourn of this kind. If a merchant vessel remains at anchor with the object of awaiting the arrival of smugglers at a certain place in order to transfer prohibited imports to them, it obviously cannot justify its sojourn by invoking the right of free passage. To avoid risks of this kind, the riparian State may place restrictions on such sojourn. (For the sojourn of warships in a territorial sea, see p. 110.)

Furthermore, the right of free passage includes the passage of persons and goods whose admission to the foreign territory is prohibited—assuming, of course, that the passage required is merely through the territorial waters in question. The crew of a German fishing-boat found in Moroccan territorial waters was recently prosecuted in the French naval courts, not only on the ground that fishing was prohibited but on the ground that the vessel had entered Moroccan territory without special authorisation and in contravention of an explicit prohibition. It would be desirable to formulate definitely the right of transit for persons and goods as a corollary of the principle

of free passage. As regards that part of the territorial sea which connects international rivers with the high seas, this principle is already established by Article 3 of the Statute on the Régime of Navigable Waterways of International Concern.

Article 7 of the proposed Convention would contain the following provisions:

"*Pacific passage.*

"*Article* 7.—All vessels, without distinction, shall have the right of pacific passage through the territorial sea. In the case of submarine vessels, this right shall be subject to the condition of passage on the surface. The right of passage includes the right of sojourn, in so far as the latter may be necessary for navigation. For the sojourn of warships, see Article 12.

"The right of free passage includes the right of passage for persons and goods, independently of the right of access to the foreign mainland."

### *X. Coasting Trade*

The right of the riparian State to reserve the coasting trade to its own nationals is an exception to the right of passage through foreign territorial waters. On this subject there is a general juridical conception which is embodied in numerous national enactments and in international conventions, and which is also reflected in the doctrine of international law.

The rule excluding vessels flying a foreign flag from the coasting trade is enforced by the legislation of almost every European country: Germany, Law of May 22nd, 1881; France, Law of September 21st, 1793, Law of April 2nd, 1889, Law of July 22nd, 1909; Portugal, Article 1315 of the Commercial Code of 1833 kept in force by the law approving the Commercial Code of 1888; Spain, Decree of July 15th, 1870; Italy, Law of July 11th, 1904. Great Britain: the Navigation Act of 1849 restricted the coasting trade to British subjects, but an Act of March 23rd, 1854, substituted a system of freedom for the system of prohibition, subject to the Government's right to withdraw by Order in Council the right of engaging in the coasting trade from the vessels of States which do not admit reciprocity. The coasting trade is free in Belgium and the Netherlands on payment of an indemnity. Finland has reserved the maritime coasting trade to her own vessels. Paragraph 4 of the "Commercial Law" of December 27th, 1919: "Commercial navigation between places situated in Finland shall only be carried on by Finnish vessels." See also the Treaty of Peace of Dorpat, Article 32, Section 6, paragraph 3: "The term coasting vessels, however, shall not include vessels navigating between the ports of the Baltic and the ports of other seas contiguous to Russia, including the seas in the interior of that country." Treaty of Commerce and Navigation concluded by Finland with Denmark, August 3rd, 1923, Article 17; with Germany, January 19th, 1923, Section 22, paragraph 2; with Great Britain, December 14th, 1923, Article 13, paragraph 3: "It is also understood that, in the event of the coasting trade of either party being exclusively reserved to national vessels, the vessels of the other party, if engaged in trade to or from places not within the limits of the coasting trade so reserved, shall not be prohibited from the carriage between two ports of the territories of the former party of passengers holding through tickets or merchandise consigned on through bills of lading to or from places not within the above-mentioned limits, and while engaged in such carriage these vessels and their passengers or cargoes shall enjoy the full privileges of this treaty."

The coasting trade is prohibited by the following conventions: France-Sweden and Norway, February 14th, 1865, Article 4; France-Austria, December 11th, 1866, Article 5; France-Russia, April 1st, 1874, Article 10; France-Spain, December 18th, 1877; France-Portugal, December 19th, 1881, Article 23; France-Great Britain, February 28th, 1882, Article 8; France-Austria-Hungary, April 9th, 1884, Article 8; France-Mexico, November 27th, 1886, Article 19; Peru-Portugal, 1853; Peru-United States, 1870; Peru-Russia, 1874; Peru-Argentine, 1874. Germany specially authorised the coasting trade with Siam, February 7th, 1872, Article 1; Roumania, February 14th, 1877, Article 1; Austria-Hungary, May 23rd, 1881, Article 11.

*Cf.* BJÖRKSTEN, *op. cit.*, p. 113: "Man unterscheidet zwischen kleiner Cabotage (*petit cabotage*) und grosser Cabotage (*grand cabotage*). Unter jener ist die Schifffahrt zwischen zwei demselben Staate zugehörigen am selben Meere belegenen, unter dieser die Seefahrt zwischen zwei demselben Staat zugehörigen, aber an verschiedenen Meeren gelegenen Häfen zu verstehen." P. 114: "In dem dem Entwurf des Wasserstrassen-Abkommens begleitenden Bericht, welcher der Konferenz von Barcelona vorgelegt wurde, wurde folgende Definition des Begriffs Cabotage gegeben: 'Les mots transports locaux signifient les transports autres que les transports à l'importation, les transports à l'exportation, les transports en transit, avec ou sans transbordement d'un navire ou bateau dans un autre, avec ou sans mise à quai, avec ou sans mise en entrepôt intermédiaire'."

*Cf.* also Charles DE VISSCHER, *Le Droit international des communications*, p. 144.

It would be of advantage to codify the legal conception of the coasting trade, because certain doubts as to what is to be covered by the term could then be cleared up. If a codified rule could really be arrived at, it would give expression to an undoubtedly increasing tendency in the evolution of modern law. The question at issue is this: The most essential reason for reserving the coasting trade to the riparian State is, in accordance with the accepted doctrine of the theory of ancient international law, the desire to reserve the fishing in the territorial sea to the people of the coast, who are generally poor. This is largely a local and manual (*handwerklich*) industry, and it seems to us entirely irrational to extend the notion of coasting trade under the name of "long-distance coasting trade" (*grand cabotage*) so as to make it cover voyages from a port in a particular State to a port in a remote colony. The only possible result of such a legal conception would be to impose intolerable restrictions on the common use of the sea. Happily, there is now perceptible in the practice of States a tendency to confine the notion of the coasting trade to its original limits. Such tendencies as this are in the interests of international freedom of commerce and transit. Thus, on the occasion of the elaboration of the Ports Statute, the Geneva Conference of 1923 made the following recommendations:

"The Conference recommends that all States, including those which are not Members of the League of Nations, should accept the fundamental principles of the above-mentioned Statute and should refrain from inequitable economic measures, such as, in particular, an abusive extension of the scope of the maritime coasting trade.

"More especially, the Conference recommends to the States signatories to the Convention on the International Régime of Maritime Ports, or adhering thereto, and under the same sovereignty as other States whose territory is situated overseas, or States which have such territories under their sovereignty or authority, to apply, in all circumstances, in their ports or in the ports of the above-mentioned territories, and in the conditions laid down in

Articles 2, 5 and 6, the same treatment to their own ships carrying on trade between their territories and such States or overseas territories, and also to their cargoes and passengers, as is applied to the ships of other Contracting States utilising the aforesaid ports and carrying on other trade than the trade specified above."

"The Brazilian delegation, supported by certain other delegations, made a definite statement that, as regards the conveyance between two ports in the same country of national or nationalised goods and of passengers coming from or destined for these ports, the general conditions as to transport, including, for example, harbour dues, pilotage, towage and railway rates, were not governed by the Convention. The Committee, however, considered that it was inadvisable to make a pronouncement on this subject. On the other hand, in whatever way the meaning of the phrase 'coasting trade' might be extended—the Committee did not wish to define its scope—the latter considered that a vessel, which called in turn in the course of a voyage at two or more ports between which navigation was reserved, should not be regarded as engaged in coasting trade unless it disembarked in one such port a cargo or passengers embarked at another such port."

A Convention drawn up at Barcelona, Article 5 of the Statute on the Régime of Navigable Waterways of International Concern, manifests the same tendency, as regards the coasting trade on important international rivers, to restrict the meaning of the coasting trade in the interests of freedom of commerce and transit:

"A riparian State has the right of reserving for its own flag the transport of passengers and goods loaded at one port situated under its sovereignty or authority and unloaded at another port also situated under its sovereignty or authority. A State which does not reserve the above-mentioned transport to its own flag may nevertheless refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does reserve it."

We therefore recommend that the following article be included in the Convention:

"*Coasting trade.*

"*Article* 8.—A riparian State has the right of reserving for its own flag the transport of passengers and goods loaded at one port situated under its authority and unloaded at another port also situated under its authority. A State which does not reserve the above-mentioned transport to its own flag may nevertheless refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does reserve it."

### *XI. Jurisdiction*

Questions of special difficulty arise when we come to consider how far a vessel passing through territorial waters is subject to the civil and criminal jurisdiction of the riparian State. We feel that in considering this question it is well to distinguish two cases—that of a vessel passing through foreign territorial waters and that of a vessel at a port in a foreign riparian State; for the legal position is essentially different. The port forms a portion of the inland waters, as is also perhaps implied by the definition given in the Ports Statute.

See De Visscher, *op. cit.*, pp. 108 *et seq.*: "A très juste titre, la Conférence a estimé qu'un port maritime se caractérise essentiellement non par le fait qu'il est situé sur la mer,

mais par le fait qu'il est régulièrement fréquenté par les navires de mer . . . Un port situé sur une voie d'eau intérieure tomberait donc sous l'application du Statut, s'il est utilisé normalement pour la navigation maritime . . ."

The territorial sea, on the other hand, has an entirely different character. For the present, therefore, we must leave on one side the case of a vessel in foreign ports; we shall deal with it later.

In our opinion, to subject vessels passing through the territorial sea to the full jurisdiction of the riparian State would be to restrict the use of the territorial sea to the detriment of such vessels. Applying this principle to civil jurisdiction, it would, for example, be possible for the creditors of a shipowner, on learning that their debtor's vessel was passing through the national territorial sea, to obtain an order from the Courts of the riparian State enabling them to have the vessel stopped in the middle of her voyage and seized as security.

Throughout the history of international law, there is no known case in which the Courts of a riparian State have been able to extend their competence to the point of ordering such a seizure or of taking such action as to compel witnesses to attend by coercion or arrest according to the rules of civil procedure. On the contrary, M. Fauchille quotes a decision of the French Cour de Cassation refusing to admit such competence on the ground that, "si les eaux territoriales sont remises aux pouvoirs de police et de sûreté de l'Etat, elles ne forment pas une portion du territoire français ou colonial et ne rentrent pas, dès lors, dans l'une quelconque des circonscriptions judiciaires en lesquelles il a été divisé." (*Proux* v. *Courcoux*, Chambre civile, November 20th, 1918, FAUCHILLE, p. 1096.)

It must not, however, be overlooked that opposite views are represented both in the doctrine of international law and in the codification projects. These views are clearly connected with the needs of criminal jurisdiction and assimilate the case to that of the legal position in connection with ports.

It is noteworthy, for example, that, whereas the Institut de Droit international adopts the principle of the exemption of vessels passing through the territorial sea from the jurisdiction of the riparian State, the distinguished jurist, Oppenheim, takes the opposite view; that is to say, he extends the jurisdiction of the riparian State to vessels passing through the territorial sea. The proposals put forward by the American Institute of International Law appear, in substance, to support Oppenheim's doctrine, since they subject vessels to the legislation of the riparian State and make no exception in the matter of jurisdiction. The riparian State could thus claim the right to unlimited jurisdiction over vessels passing through the territorial sea.

*Cf.* Institut de Droit international, Article 8, paragraph 1: "Les navires de toutes nationalités, par le seul fait qu'ils se trouvent dans les eaux territoriales, à moins qu'ils ne soient seulement de passage, sont soumis à la juridiction de l'Etat riverain . . ."

Oppenheim project: "Les navires de toutes nationalités, par le seul fait qu'ils se trouvent dans les eaux territoriales, sont soumis à la juridiction de l'Etat riverain."

Project of the American Institute of International Law: Article 7, paragraph 1: "Merchant vessels of all countries may pass freely through the territorial sea, subject to the laws and regulations of the Republic to which the said sea belongs."

There is a decision of the Federal Court of the United States which seems to admit of an intermediate point of view. It recognises in principle the jurisdiction of the riparian State, but endeavours to attenuate the monstrous consequences of this juridical conception by admitting the discretionary power of that State in regard to the application of the principle—a solution which does not seem entirely satisfactory.

*Cf.* NIELSEN: "The Lack of Uniformity in the Law and Practice of States with regard to Merchant Vessels," *American Journal of International Law*, Vol. 13, 1919, p. 81: "The general principles laid down in the cases to which attention has been called are concisely summarised with citations in the following extract from the opinion of the Court in the case of *Esther*, in which suit was brought against the Swedish steamship by a seaman to recover unpaid wages and damages for personal injury: . . . In the absence of treaty stipulations, the Courts of Admiralty have civil jurisdiction in all matters appertaining to the foreign ship . . . in certain cases when the Court has the vessel in its territorial jurisdiction . . . The exercise of this civil jurisdiction . . . is not imperative but discretionary, and the Courts from motives of convenience or international comity will not take jurisdiction without the assent of the country to which the ship belongs, where the controversy involves matters arising beyond the territorial jurisdiction of this country, or relates to differences between the master and the crew, or the crew and the shipowners . . ."

The question has been dealt with more frequently from the point of view of criminal jurisdiction. Of course, the writers and the Courts who wish to exempt passing vessels from the jurisdiction of the riparian State admit that the latter is competent to deal with offences against the regulations issued, in accordance with law, by the riparian State with regard to trade in the territorial waters (fishing, Customs and health control). On the other hand, the writers and the Courts who favour the jurisdiction of the riparian State over vessels passing through territorial waters contend that it has unlimited criminal jurisdiction in respect of all offences committed on board a foreign vessel passing through its territorial waters. British jurisprudence accepts this view in principle since the famous "Franconia" case, and the principle is established in the Territorial Waters Jurisdiction Act. In practice, however, this doctrine is restricted by the fact that no such criminal proceedings can take place except at the special request of one of the principal Secretaries of State. Except in the case of Great Britain, national legislation and international practice are divergent. Most countries are opposed to the conception admitted by Great Britain.

"Le système français fait application à la mer territoriale des règles de l'avis du Conseil d'Etat français du 21 novembre 1806 sur le régime des navires de commerce étrangers dans les ports. Il part du principe que la mer territoriale est une portion de l'Etat côtier qui doit soumettre à sa juridiction pénale les faits coupables commis à bord de tous les bâtiments marchands existant dans ladite mer, à l'exception de ceux qui ne portent pas atteinte à l'intérêt du riverain, pour lesquels la compétence doit appartenir aux tribunaux de l'Etat du navire. Les faits qui échappent ainsi à la juridiction territoriale sont: (1) les infractions à la discipline et aux services intérieurs; (2) les crimes ou les délits commis à bord entre

gens de l'équipage, à quelque nationalité que ceux-ci appartiennent, qui n'ont pas troublé la tranquillité du territoire ou au sujet desquels le secours de l'autorité locale n'a pas été réclamé." (FAUCHILLE, *op. cit.*, p. 1099.)

"Le système de l'avis du Conseil d'Etat du 20 novembre 1806 a été consacré par les conventions signées par la France, en son nom ou au nom des pays du protectorat français, avec la Bolivie, le 5 août 1897, article 21; la République Dominicaine, le 25 octobre 1882, article 21; l'Espagne, le 7 janvier 1862, article 24 (2); les Etats-Unis, le 23 février 1853, article 8; la Grèce, le 7 janvier 1876, article 21; le Honduras, le 22 février 1856, article 23; l'Italie, le 26 juillet 1862, article 13; le Portugal, le 11 juillet 1866, article 12; la Russie, le 1er avril 1874, article 11; le Salvador, le 5 juin 1878, article 21 (1 et 2)." (TRAVERS, *Le Droit pénal international*, Vol. 2, pp. 378 *et seq.*)

The Treaty concluded on December 2nd, 1856, between the French and Spanish Governments quite definitely departs from the principles of the opinion given by the Conseil d'Etat on November 20th, 1806. According to Article 25 of this agreement: "Toute embarcation naviguant, passant ou pêchant dans la Bidassoa demeurera soumise exclusivement à la juridiction du pays auquel elle appartiendra, et ce ne sera que sur les îles et sur le territoire ferme soumis à leur juridiction que les autorités de chaque Etat pourront poursuivre les délits de fraude, de contravention aux règlements ou de toute autre nature que commettraient les habitants de l'autre pays; pour prévenir les abus et les difficultés qui pourraient résulter de l'application de cette clause, il est convenu que toute embarcation touchant à l'une des rives, y étant amarrée ou s'en trouvant assez rapprochée pour qu'il soit possible d'entrer directement au rivage, sera considérée comme se trouvant déjà sur le territoire du pays auquel appartient cette rive." (TRAVERS, *op. cit.*, p. 384.)

The Franco-Spanish Treaty has served as a model for all the subsequent conventions concluded by France, namely, with Italy, July 26th, 1862, Article 13; Portugal, July 11th, 1866, Article 12; Russia, April 1st, 1874, Article 2; Greece, January 7th, 1876, Article 21; Salvador, June 5th, 1878, Article 21; San Domingo, October 20th, 1882, Article 21; Bolivia, August 5th, 1897, Article 21.

The laws of a considerable number of other countries, while conforming in principle to the diplomatic agreements enumerated above, follow in practice the system described in the opinion of the French Conseil d'Etat of November 20th, 1806. Mention may be made of Belgian legislation, of Article 189 of the Mexican Penal Code and of Article 53 of the Portuguese Penal Code. The general ideas of the French system have also been adopted in Italy. (TRAVERS, pp. 390 *et seq.*)

According to KOHLER (*Internationales Strafrecht*, p. 240), Germany has adopted the French system: "Das ergibt sich aus den Gesetzen vom 30. April 1884 und 4. März 1884, welche die Bestimmungen der Internationalen Nord-See Verträge auf die Küsten-Gewässer erstrecken, also einerseits der deutschen Gesetzgebung das Recht bestätigen, derartige Bestimmungen zu treffen, andererseits den fremden Fahrzeugen eine relative Selbstständigkeit zuerkennen. Daher auch die Bestimmung des § 129 Seemanns-Ordnung 1902, wonach eine Strafklage gegen einen Kapitän von Seiten eines Mitgliedes der Schiffsmannschaft nicht bei einem ausländischen Gericht erhoben werden darf. Es ergibt sich ferner für Deutschland, wie für andere Länder, aus der den Konsuln eingeräumten Polizei-Befugnis über die internen Verhältnisse der Inland-Schiffe, die in dem ausländischen Hafen liegen. Vergleiche das deutsche Gesetz über Bundes-Konsulate 1867, § 33, so dann die Dienst-Instruktion für Konsuln, 22. März 1873, worin ausgesprochen ist, dass bei internationalen Streitigkeiten des Schiffes die Lokal-Behörden nur einzuschreiten haben, wenn sie ersucht werden, oder wenn die öffentliche Ordnung gefährdet ist. Man vergleiche auch die deutschen Konsular-Verträge, z. B. den Konsular-Vertrag mit Russland 8. Dezember 1874, Artikel 11: 'Den Konsuln . . . steht ausschliesslich die Aufrechterhaltung der innern Ordnung an Bord ihrer nationalen Schiffe zu'."

Certain Latin-American countries, however, accept the British view.

"Conformément au principe du droit anglais et plus absolu, l'article 5 du code pénal chilien soumet à la loi chilienne les infractions commises à bord des navires étrangers autres que les navires de guerre, dans les ports chiliens et les eaux chiliennes. Par application de cette disposition, la Cour de la Séréna a, en 1876, affirmé la compétence des tribunaux, chiliens pour connaître d'un vol commis à bord du vapeur anglais 'Eten,' alors que ce bâtiment était, non pas dans un port, mais dans les eaux territoriales, à la hauteur de Huasko.

"L'article 2 du code d'instruction pénale de la République de l'Equateur contient une disposition semblable.

"Le Traité de Montevideo du 23 janvier 1889, relatif au droit pénal international, conclu entre le Paraguay, le Pérou, la République Argentine et l'Uruguay a pleinement consacré le système de la loi anglaise de 1878 et des législations du Chili et de l'Equateur. L'article 11 porte que les délits commis à bord des navires de commerce seront jugés et punis conformément à la loi de l'Etat dans les eaux duquel se trouvera le navire à l'époque où une infraction aura été commise." (TRAVERS, *op. cit.*, pp. 401 *et seq.*)

The practice of the United States Courts does not appear to be uniform.

"Der Standpunkt der amerikanischen Gerichts-Praxis ist nicht ganz klar. Viel spricht dafür, dass man in der Union hauptsächlich dem französischen System nach dem Urteil von 1859 nahe steht. In dem Falle Wildenhus von 1886 wurde vom Richter erklärt, dass auf Grund des internationalen Rechts ein Schiff das den Hafen eines fremden Staates zu Handelszwecken anlaufe, mangels anderweitiger Vertrags-Bestimmungen der lokalen Gerichtbarkeit unterworfen sei." (BJÖRKSTEN, *op. cit.*, p. 124.)

"But it had come to be generally recognised that, in comity, all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and which did not involve the peace or dignity of the country or the tranquillity of the port, should be left to be dealt with by the authorities of the nation to which the vessel belonged." (WHEATON, *International Law*, pp. 168 *et seq.*)

As regards the codification projects, the Institut de Droit international, as we have already observed, takes the view that vessels passing through territorial waters are not as a general rule subject to criminal jurisdiction, except in the case of injury to the rights and interests of a riparian State or of one of its nationals not on board the vessel.

Institut de Droit international, Article 6: "Les crimes et délits commis à bord de navires étrangers de passage dans la mer territoriale par des personnes qui se trouvent à bord de ces navires, sur des personnes ou des choses à bord de ces mêmes navires, sont, comme tels, en dehors de la juridiction de l'Etat riverain, à moins qu'ils n'impliquent une violation des droits et des intérêts de l'Etat riverain ou de ses ressortissants ne faisant partie ni de l'équipage ni des passagers."

The same principle is adopted in the project drawn up by M. Storny for the International Law Association (Article 18). It should be observed that the project of the American Institute of International Law limits criminal jurisdiction in the same way in Article 10, although, as we have pointed out above, it lays down the principle that the riparian State has unlimited jurisdiction over vessels passing through its territorial waters.

The American Institute of International Law: Article 10: "Crimes committed on board a merchant vessel in the territorial sea belonging to an American Republic shall be subject to the jurisdiction of the country to which the vessel belongs, unless they disturb the order and public tranquillity of the region where they have been committed. In this case, they shall be subject to the authority of the Republic where the act in question was committed."

The distinguished Professor Oppenheim proposes that Article 8 of the project of the Institut de Droit international should be revised so as to establish, as regards vessels passing through territorial waters, the joint competence, in matters of criminal jurisdiction, of the riparian State and of the State from which the vessel comes.

It would seem urgently necessary to clear up this vitally important question by way of codification. In our view, the predominant tendency in international practice and in the projects for codification should be followed, that is to say, the competence of the riparian State in matters of criminal jurisdiction in respect of vessels passing through the territorial sea should be limited. It is the business of law to settle questions of capital importance in a satisfactory manner. If, however, we consider the actual circumstances, we are obliged to ask what reason there is for recognising the criminal jurisdiction of a riparian State, which in most cases cannot possibly be exercised for purely practical reasons. We allude primarily to vessels passing through territorial waters without putting in at any port, and consequently without any intention of entering into closer relations with the riparian State. We also have in mind the case of vessels which, although they have called at a port in a riparian State, have left it and are heading for the high seas by way of the territorial sea. As a general rule, the riparian State is ignorant of what occurs on board such vessels.

The practical importance of the question of jurisdiction becomes much greater when a crime is committed on board a vessel while it is crossing the territorial sea to put in at a port of the riparian State. In the ordinary way, the authority in control of the vessel, representing the authority of the national Government, would take steps to bring the offender to justice. If, however, the offence was an offence against the authority in control of the vessel itself, and if the authority legitimately in control of the vessel had been rendered impotent, as in the famous "Franconia" case, it would be sufficient for the port authorities, by virtue of their right to maintain public order, to arrest the offender and notify the official representative of the State concerned.

Even if, as against a convention limiting in the manner suggested the penal jurisdiction of the riparian State, individual Governments invoked arguments based on legal conceptions conflicting with those of their countries, such a convention would have most valuable effects if it imposed the restrictions in question. It is obvious that the principle that vessels passing through territorial waters are completely exempt from the jurisdiction of the riparian State cannot be applied unconditionally.

The riparian State ought indeed to be legally entitled to take action in respect of all offences jeopardising the maintenance of order in territorial waters. We shall deal later with the power of the riparian State to establish such legal rules and with the penalties for their infringement.

For the moment, we are considering prosecutions for offences which are not

closely connected with the specifically territorial character of the waters. Such offences can only come under the criminal jurisdiction of the riparian State if their consequences have not been confined to the vessel, crew and passengers (if, for example, the pilot, after coming on board, is murdered or paid in false money). It is, of course, essential, as a condition of the jurisdiction of the riparian State, that such offences should be punishable according to the laws of that State and that its Courts should be competent to try such cases.

Any disputed questions in international private law which may arise out of such incidents will not be dealt with here.

Article 9 of the Convention should contain the following provisions:

"*Jurisdiction.*

"*Article* 9.—Vessels of foreign nationalities passing through territorial waters shall not thereby become subject to the civil jurisdiction of the riparian State.

"Further, crimes and offences committed on board a foreign vessel passing through territorial waters by persons on board such vessels against persons or things also on board shall, as such, be exempt from the jurisdiction of the riparian State.

"Offences, the consequences of which are not confined to the vessel or the persons belonging to it, are subject to the criminal jurisdiction of the riparian State in so far as they constitute offences against its established law and its tribunals have competence to deal with them."

### *XII. Regulations*

If, in accordance with the foregoing arguments, the riparian State is to be recognised as possessing a right of jurisdiction within certain limits over vessels passing through its territorial waters, that State has undoubtedly, as a consequence of its power of dominion, a *potestas legislatoria et executoria.*

Accordingly, the riparian State is the legislator within the limits of the territorial waters under its dominion. Vessels and their crews which are merely passing through the territorial waters can only be bound by the legal regulations established to protect those of the riparian State's interests which are specially concerned with the territorial waters. The practical outcome of this doctrine would be the establishment of the principle that a general regulation of the riparian State based upon the conception of the *jus soli* could not apply to a child born on a foreign vessel passing through the territorial waters. Consequently, such child would not acquire the nationality of the riparian State. On the other hand, a vessel passing through territorial waters can never urge an exceptional situation as a ground for the non-application of the regulations issued by the riparian State in regard to police matters, Customs duties and health dues in its territorial waters.

The doctrine and practice of international law agree in upholding the right of the riparian State to legislate and exercise administrative authority in its

territorial waters for the following purposes: regulation of navigation, preservation of marine signals and lighthouses, prevention of shipwreck, regulation of pilotage, protection of submarine cables, regulation of Customs inspection, including the inspection of prohibited imports or exports, supervision of fishing, health control, assistance at sea, and boarding of vessels. All such lists are, of course, merely explanatory, and the riparian State will have the right to employ its legislative and administrative authority in favour of various interests deserving of its protection which may arise in connection with navigation in territorial waters. It therefore seems preferable to give expression to this legal doctrine in the proposed Convention. In this connection, we propose to examine more closely the rights referred to, as doubts have been raised as to their scope.

In the first place, in connection with the endeavour to secure a safe route for navigation, the following rule is to be found in the Barcelona Statute on Freedom of Transit:

Article 2, first sentence: "Subject to the other provisions of this Statute, the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit."

*Cf.* Article 10, paragraph 1, of the Statute on the Régime of Navigable Waterways of International Concern: "Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway or to reduce the facilities for navigation and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation."

It would perhaps be desirable to require a similar undertaking in respect of territorial waters; but it is very doubtful whether riparian States would be willing to give it, for, in our view, no such obligation yet exists in general international law.

As regards preoccupations in connection with vessels foundering in territorial waters, mention should be made of certain progressive treaties recently concluded between Finland and other countries.

See BJÖRKSTEN, *op. cit.*, p. 122: "Einige von den Verträgen Finnlands mit fremden Mächten enthalten Bestimmungen betreffend verunglückten Schiffen. Ihnen liegt der Gedanke zu Grunde, das Interesse des Eigentümers zu schützen. Die vollständigsten Vorschriften enthalten Artikel 19 des finnländisch-englischen Handels- und Schifffahrts-Vertrages vom 3. August 1921. Er stellt den Grundsatz der Gleichberechtigung und Meist-Begünstigung auf. Er sieht ein Zusammenwirken der Behörden des Territorial-Staates und des konsularen Vertreters des Flaggen-Staates vor. Geborgene Waren unterliegen keinen Zöllen, soweit sie nicht dem Verbrauch der territoriale Staaten überlassen werden. Ungefähr dieselben Regeln gelten für Finnland und Gross-Britannien auf Grund des Handels-Vertrages vom 15. Dezember 1924, Artikel 16, Absatz 2 ff. In derselben Richtung geht auch Artikel 5 des Schifffahrts-Vertrages mit Schweden vom 26. Mai 1923. Es kann als allgemeine Regel, welche nicht eigentlich eine Rechtsregel, sondern vielmehr eine solche der Völker-Sitte ist, festgestellt werden, dass der Vertreter des Flaggen-Staates intervenieren darf."

It cannot be said, however, that this is already a generally established legal conception.

*Pilotage.*—In France, a law dated March 27th, 1882, regulates the question of buoyage in territorial waters. As regards signals of distress and signals connected with pilotage, regulations were made in England by the Merchant Shipping Act of 1873, and in Germany by a decree of August 14th, 1876. An Act of Parliament of December 21st, 1913, excludes foreign pilots from British waters.

Article 11 of the Statute on the International Régime of Maritime Ports, first sentence: "Each Contracting State reserves the right to organise and administer pilotage services as it thinks fit."

The Institut de Droit international has the following clause in its seventh article: "Les navires qui traversent les eaux territoriales se conformeront aux règlements spéciaux édictés par l'Etat riverain, dans l'intérêt et pour la sécurité de la navigation et pour la police maritime."

Article 2 of the Storny project of the International Law Association is as follows: "La mer territoriale s'étend depuis le rivage jusqu'au point indispensable, à l'effet de garantir la défense, la neutralité et d'assurer les services de la navigation et de la police maritime côtière en leurs diverses manifestations."

Article 6, paragraph 3, of the American codification project reads: "The American Republics may also enact all laws and regulations which they may deem necessary to assure the observance of measures of hygiene, security, police and Customs, in so far as they are in accordance with the international conventions concluded by them. The said laws and regulations should be communicated to the Pan-American Union."

*Submarine cables.*—In France, a law of December 20th, 1884, imposes penalties in respect of the damaging of cables in French waters. Numerous other countries have also enacted laws and decrees on this subject. As regards the codification projects, see under *Pilotage.*

*Customs inspection.*—The rights of Customs inspection are formulated very clearly by M. FAUCHILLE, p. 159: "L'Etat côtier est autorisé à établir dans ses eaux territoriales une surveillance douanière qui entraîne le droit de police sur les navires, la visite et la détention des bâtiments et barques soupçonnées de contrebande, la capture des articles prohibés et leur confiscation, la répression par voies d'amende et de confiscation."

A special codified rule would seem superfluous. National legislations, international practice and the codification projects are all in general agreement with the definition given by M. Fauchille.

See "La Pratique" in M. FAUCHILLE's treatise, *op. cit.*, pp. 159 *et seq.* See also the American project of the American Institute of International Law, Article 11, paragraph 1: "The American Republics may extend their jurisdiction beyond the territorial sea parallel with such sea for an additional distance of . . . marine miles for reasons of safety, and in order to assure the observance of sanitary and Customs regulations."

In connection with the scope of the powers of the Customs police, a controversy of some importance arose last year. After the entry into force of the American prohibitionist legislation, a decision of the United States Supreme Court of April 30th, 1923, recognised the right of Customs officials to seize all alcoholic liquor in American territorial waters, including even alcoholic liquor which it was not proposed to import illegally but which would at the end of a voyage have been unloaded at a port where its importation was not prohibited. The execution of this decision by the American Customs authorities gave rise to protests from various European States—Great Britain, France, the Netherlands, Portugal, Denmark, Italy, etc.

The Statute on the International Régime of Maritime Ports adopted by the General Conference on Communications and Transit gave States power

to prohibit the transit of goods of which the importation into the State concerned is prohibited. It seems, however, more than doubtful whether this principle can also apply to territorial waters, for, in the case of land transit, it must be assumed that the State concerned has the right to decide what goods it will accept for transit.

As against this sovereign right of the State there is no recognised right attaching to other States. The legal position is entirely different in territorial waters, for here the vessels of other States have a right of free passage. This right of free passage includes a general right of transport (see Article 7, paragraph 2, of the proposed Convention). The right to transport alcoholic liquor could only be refused if the riparian State could prove the impossibility of maintaining the import prohibition in respect of alcoholic liquor, and such proof would be a matter of great difficulty. In any case, the question arises whether a rule should not be introduced to reconcile the interests concerned, as provided in Article 17 of the Statute on the Régime of Maritime Ports:

"Each Contracting State shall be entitled to take the necessary precautionary measures in respect of the transport of dangerous goods or goods of a similar character, as well as general police measures, including the control of immigrants entering or leaving its territory, it being understood that such measures must not result in any discrimination contrary to the principles of the present Statute."

*Supervision of Fishing.*—In connection with the right of the riparian State to reserve fishing rights exclusively to its own nationals, it may be asked whether the right of supervision over fishing can be extended so far as to include the power of refusing access to the sea to all foreign fishing-boats whatever. Such a step would, of course, constitute the most effective means of putting down illegal fishing, but it would conflict with the right of free passage which is established for all vessels. This legal conception is also reflected in the well-known North Sea Fisheries Convention of 1882.

*Health Supervision.*—See FAUCHILLE, *op. cit.*, p. 161. For the codification projects, see under *Pilotage.*

*Ceremonial at Sea.*—See FAUCHILLE, *op. cit.*, p. 167.

The right of the riparian State to issue regulations governing the obligations arising out of the boarding of vessels in territorial waters, the obligation to furnish assistance in urgent cases, and the claims which may result, is not disputed. It would undoubtedly be desirable to extend the Conventions of 1910 on the Safety of Life at Sea and on the Boarding of Vessels—which deal with the boarding of vessels and the furnishing of assistance on the high seas—to cover identical or similar circumstances occurring in territorial waters.

Within the limits of the riparian State's rights of legislation and administration, that State should obviously have the legal power to enforce those rights; accordingly, it should be granted not only the right to take necessary measures of constraint but also a power of jurisdiction to deal with offences. This is a general legal conception and finds its specific expression in a right

of pursuit which may extend even on to the high seas. Except in an arbitral award rendered by the distinguished Dutch jurist ASSER, the existence and scope of this right of pursuit have never been disputed in international practice.

See TRAVERS, *op. cit.*, III, pp. 248 *et seq.* See also the project of the Institut de Droit international, Article 7, second and following sentences: "L'Etat riverain a le droit de continuer sur la haute mer la poursuite commencée dans la mer territoriale, d'arrêter et de juger le navire qui aurait commis une infraction dans les limites de ses eaux. En cas de capture sur la haute mer, le fait sera toutefois notifié sans délai à l'Etat dont le navire porte le pavillon. La poursuite est interrompue dès que le navire entre dans la mer territoriale de son pays ou d'une tierce Puissance. Le droit de poursuite cesse dès que le navire sera entré dans un port de son pays ou d'une tierce Puissance."

Project of the American Institute of International Law: Article 9: "Merchant vessels which violate the provisions of the present Convention or the laws and regulations of an American Republic in regard to its territorial sea are subject to the jurisdiction of the said Republic. Such Republic has the right to continue, within the zone contiguous to its territorial sea, the pursuit of a vessel commenced within its territorial waters, and to bring the vessel before its Courts."

It would further be desirable to lay down the principle that all the rights exercised by the riparian State over foreign vessels in its territorial waters, and also its rights to levy dues, must be applied without discrimination. No dues must be levied except dues intended solely to defray expenses of supervision and administration. The adoption of this principle should be recommended; it has already found expression in the Conventions on the Régime of Navigable Waterways of International Concern and in the Statute on Freedom of Transit.

Article 3 of the Statute on Freedom of Transit: "Traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover, and the dues must be imposed under conditions of equality . . . "

Article 7 of the Statute on the Régime of Navigable Waterways of International Concern: "No dues of any kind may be levied anywhere on the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of payment for services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterway and its approaches or to meet expenditure incurred in the interest of navigation. These dues shall be fixed in accordance with such expenses . . . "

It would be desirable, in accordance with the project of the American Institute of International Law, which provides for the registration with the Pan-American Union of all binding regulations governing navigation in territorial waters, that such regulations should be registered at a central office. Their registration at the International Waters Office would undoubtedly be of great value. One of the duties of the Office would be to publish such regulations.

Accordingly, Article 10 of the Convention should contain the following provisions:

"*Regulations.*

"*Article* 10.—Within its territorial waters, the riparian State shall have the power of legislation and administration for the following purposes: regulation of navigation, preservation of marine signals and lighthouses, prevention of shipwreck, regulation of pilotage, protection of submarine cables, regulation of Customs inspection, including the inspection of prohibited imports and exports, supervision of fisheries, health control, assistance at sea, and collisions.

"The riparian State shall have the right to extend its legislative and administrative action to other domains when interests deserving of its protection in territorial waters are affected.

"Within the limits of the riparian State's right of legislation and administration, it shall be granted also the right to employ the necessary means of constraint to enforce its jurisdiction, in order that it may be able to deal with offences.

"The riparian State shall have the right to continue on the high seas the pursuit of a vessel commenced within its territorial waters, and to arrest and bring before its Courts a vessel which has committed an offence within its territorial waters. If, however, the vessel is captured on the high seas, the State whose flag it flies shall be notified immediately. The pursuit shall be interrupted as soon as the vessel enters the territorial waters of its own country or of a third Power. The right of pursuit is extinguished as soon as the vessel has entered a port of its own country or of a third Power.

"Within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration. Such dues or charges shall be levied under conditions of equality.

"All regulations issued by riparian States regarding their territorial waters shall be registered and published by the International Waters Office."

### *XIII. Riches of the Sea*

In virtue of its right of dominion over the whole area of its territorial waters, the riparian State possesses for itself and for its nationals the sole right of ownership over the riches of the sea. This right covers the fauna found in the waters, and also everything which may be found above or below the subsoil of the territorial sea (coral-reefs, oil-wells, tin-mines).

As a rule, the most important of the riparian State's rights in respect of the riches of the sea are fishing rights. It may monopolise these or reserve them for its own nationals. Considering international law in this aspect, we may distinguish three groups of States.

1. States which by legislative enactment entirely exclude foreign fishermen from their fisheries.

*E.g.*, France (Law of March 1st, 1898, Decree of September 23rd, 1911); Germany (Article 296 (*a*) of the Penal Code and Law of February 26th, 1876); Belgium (Law of August 19th, 1891); the Netherlands (Law of October 26th, 1889); Great Britain (Act of August 2nd, 1883); Russia, Spain, Norway, Sweden and Denmark.

Among the treaties which have reserved to nationals the right of fishing in territorial waters mention should be made of those concluded by France with Great Britain, August 2nd, 1839, and November 11th, 1867, and with Spain, February 6th, 1882; by Germany with Great Britain, 1874; by Italy with Mexico, April 6th, 1890, and with Austria-Hungary, December 6th, 1891; and by Denmark with Great Britain, June 24th, 1901. The Convention concluded at The Hague on May 6th, 1882, between Germany, Belgium, Denmark, France, Great Britain and the Netherlands, regarding the supervision of fishing in the North Sea outside territorial waters, lays down that within those waters national fishermen shall enjoy the sole fishing rights along the whole of the coasts of their respective countries and the islands and ice-packs off those coasts; but it adds that the right thus conferred upon them shall in no way limit the recognised right of free movement enjoyed by all fishing vessels voyaging or mooring in the said waters, provided that such vessels observe the special police regulations of the riparian Powers.

In transferring the island of Newfoundland from France to England, the Treaty of Utrecht of March 13th/April 14th, 1713, allowed the French to retain exclusive fishing rights over a portion of the coast of the island; but these rights, after having been confirmed in principle by the Treaties of Paris, February 10th, 1763; Versailles, September 3rd, 1783; Amiens, March 27th, 1802; and Paris, May 30th, 1814, and November 20th, 1815, gave rise to protracted difficulties between the two countries and were abolished by an agreement, dated April 8th, 1904, between France and Great Britain.

On gaining their independence under the name of the United States of America, the British colonies in North America concluded in 1783 a convention with Great Britain allowing the people of the United States to continue to enjoy fishing rights on the coasts of Newfoundland, and Conventions, dated October 20th, 1818, and May 8th, 1871, again regulated the fishing rights of the United States in waters under British sovereignty, notably in Canada. Difficulties quickly arose, however, on this subject between the two countries, and the resulting dispute was settled by an arbitral award of the Hague Court on September 7th, 1910 (see FAUCHILLE, *op. cit.*, p. 163).

2. States which by separate treaties grant to the nationals of the other Contracting States fishing rights in their territorial waters, with or without reciprocity.

A Convention of July 15th/28th, 1907, between Japan and Russia granted to Japanese subjects the right to take fish of every kind, except seals for the fur trade and sea otters, along the Russian coasts in the Sea of Japan, the Sea of Okhotsk and the Behring Sea, and a Treaty of July 14th, 1899, modified on October 5th, 1907, between Denmark and Sweden granted to the subjects of the two countries the right of trawling herring in a certain zone along the Swedish and Danish coasts. By Article 7 of their Treaty of Peace of October 14th, 1920, Finland and Soviet Russia mutually granted to each other's nationals fishing rights and the right of free navigation for fishing vessels in the territorial waters along the seaboard ceded to Finland upon the Arctic Ocean and in those to the north and east of the Rybachi Peninsula remaining under the sovereignty of Russia, as far as Cape Sharapov.

3. States which do not enforce their right to exclude foreign fishermen.

Italy requires foreigners to take out a licence.

Article 1 of the Colombian Law (Law 96 of 1902) lays down that "the Government has power to organise fishing in the waters of the Republic in such manner as it may think best for the national interests."

The legal conception is perfectly clear, but the American project is the only one of the codification projects which expresses it.

Article 6: "The American Republics exercise the right of sovereignty not only over the water but over the bottom and the subsoil of their territorial sea.

"By virtue of that right, each of the said Republics alone can exploit, or permit others to exploit, all the riches existing within that zone."

*Cf.* also the Storny project, Article 22: "Les droits exclusifs de pêche demeurent soumis aux pratiques et conventions existantes, jusqu'à ce qu'une réglementation adéquate fixe les normes qui correspondent le mieux, tant au droit exclusif des Etats sur leurs côtes qu'à l'exploitation rationnelle et la conservation des espèces utilisables de la faune maritime en dehors de la zone d'exclusivité."

The riparian State has the right to regulate fishing. (See above on the supervision of fishing.) The regulation of fishing on the high seas and the exploitation of other riches of the sea can only be settled by collective agreement; but these are questions of another kind and are being dealt with by a special Sub-Committee.

To express the universally accepted legal conception, we must include the following article in the Convention:

> "*Riches of the sea, the bottom and the subsoil.*
>
> "*Article* 11.—In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil."

### *XIV. Warships*

The general legal conception is that warships, and State-owned vessels treated on the same footing, occupy a special position in territorial waters. We have already pointed out that they cannot be arbitrarily denied access to foreign territorial waters—that, indeed, they can invoke the right of free passage. On the other hand, owing to the peculiar character of warships, the riparian State can institute special precautionary measures. Dispositions of this kind are by no means exceptional in international practice.

"Quoiqu'on reconnaisse aux navires de guerre le droit d'appliquer la législation de leur pavillon, l'ordonnance néerlandaise du 30 octobre 1909, le décret français du 21 mai 1913 et le règlement équatorien du 8 janvier 1917 ont décidé qu'aucun bâtiment de guerre étranger ne pourra mettre à exécution une sentence de mort dans les eaux territoriales." (Fauchille, *op. cit.*, p. 171.)

The right of the riparian State to take such measures as we have mentioned is beyond dispute. If it is to be recognised that warships have a certain special position in foreign territorial waters, this "ex-territoriality" (as it is often called) must not be understood to mean that the regulations made by

the riparian State for its territorial waters are in principle not applicable to warships. Of course, in view of the peculiar character of warships, which constitute a portion of the military force of the State to which they belong, all measures of control, constraint and justice over them are excluded. On the other hand, the riparian State cannot be held bound to tolerate any offences which may be committed against its laws and its interests by foreign vessels. As regards questions concerning ports, the Institut de Droit international, at its session held at The Hague in 1898, proposed in the draft regulations adopted on August 23rd, 1898, the following Article 13:

"Les navires de guerre étrangers admis dans les ports doivent respecter les lois et les règlements locaux, notamment ceux qui concernent la navigation, le stationnement et la police sanitaire. En cas de contravention grave et persistante, le commandant, après avis officieux et courtois resté sans effet, pourrait être invité et, au besoin, contraint à reprendre la mer. Il en serait de même si les autorités locales jugeaient que la présence de son navire est une cause de danger pour la sûreté de l'Etat. Mais, à moins d'extrême urgence, ces mesures rigoureuses ne doivent être employées que sur l'ordre du Gouvernement central du pays."

Adopting the same principles, the French Decree of May 21st, 1913, lays down (Article 8) that: "Les bâtiments de guerre étrangers qui relâchent dans un port ou dans les eaux territoriales sont tenus de respecter les lois fiscales et les lois et règlements de la police sanitaire. Ils sont également tenus de déférer à tous les règlements de port, règlements auxquels sont assujettis les bâtiments de la marine nationale."

This principle might also be applicable to cases of warships committing offences against the laws of the riparian State in its territorial waters. Such measures could not, of course, be taken except in cases of serious and continued offences, or in cases of extreme urgency. Under all other circumstances the diplomatic channel should be used.

The following article expresses a legal conception which is already in existence:

"*Warships.*

"*Article* 12.—The exercise by warships of the right of free passage may be subjected by the riparian State to special regulations. Foreign warships when admitted to territorial waters must observe the local laws and regulations, particularly those relating to navigation, anchoring and health control. If a serious and continued offence is committed, the commander of the vessel shall receive a semi-official warning in courteous terms, and if this is without effect he may be requested and, if necessary, compelled, to put to sea. The same dispositions shall apply if the local authorities consider that the presence of the vessel threatens the safety of the State. Except in cases of extreme urgency, however, these stringent measures shall only be taken upon the instructions of the central Government of the country.

"In the case of minor offences, the diplomatic channel shall be used."

### *XV. The Right of Jurisdiction over Foreign Merchant Vessels in Ports*

The mandate conferred upon the Rapporteur and the Sub-Committee by the Committee of Experts for the Progressive Codification of International Law also covers questions relating to the State's right of jurisdiction over foreign merchant vessels in its ports.

This question is really extraneous to the problem of the territorial sea; but there is undeniably a certain analogy between them.

Moreover, the Statute on the Régime of Maritime Ports drawn up at Geneva in 1923 regulated other aspects of the rights connected with maritime ports. The question of the jurisdiction of the State over foreign merchant vessels in its ports was, however, not even touched. If it were regulated in a Convention dealing with the territorial sea, a valuable addition would be made to the Statute on the Régime of Maritime Ports.

In approaching this question of jurisdiction, it must always be remembered that the legal status of maritime ports is different from that of the territorial sea. Even in the Statute on the Régime of Maritime Ports, which ensures the right of common user to a very wide extent, maritime ports are regarded in their geographical aspect as inland waters of the State, and are accordingly given a legal status different from that of the territorial sea.

The riparian State's right of dominion over foreign vessels in its ports is obviously greater than over vessels which are merely passing through the territorial sea. This rule is also relevant in considering how far the riparian State can reserve to itself the jurisdiction over the foreign merchant vessels in its ports. Regarding the matter purely logically, we must in this case also recognise the unlimited jurisdiction of the riparian State. International practice is quite explicit in according to the riparian State a much wider jurisdiction in maritime ports than over vessels passing through the territorial sea. As regards the civil jurisdiction of the riparian State over vessels passing through the territorial sea, we nowhere find it disputed or restricted. (See FAUCHILLE, *op. cit.*, pp. 1082–1088.) The competence of the riparian State as regards measures of civil process and non-contentious jurisdiction in maritime ports is regulated on the same lines.

See FENWICK, *International Law*, p. 195: "Merchant vessels in foreign ports are not exempt from civil suit *in rem* brought by a citizen of the foreign State, nor are the officers or crew of the vessel exempt from civil suit *in personam* or from criminal prosecution. But the jurisdiction of the foreign State does not, according to one precedent, extend so far as to interfere with personal and property rights on board the vessel as regulated by the law of the flag State. In the case of the 'Creole' submitted to arbitration by the United States and Great Britain in 1853, it was held by the arbitrator that the authorities of Nassau, in liberating a number of slaves who had revolted against the officer of the ship and had put in at the port of Nassau, had acted 'in violation of the established Law of Nations' and that the claimants were 'justly entitled to compensation for their losses'."

See draft regulations of the Institut de Droit international, 1898, Article 37: "Les officiers publics, officiers de l'état civil, notaires et autres, requis pour procéder à des actes de leurs fonctions et de leurs ministères sur des navires étrangers ancrés dans un port, doivent s'y

rendre; et leurs actes, reçus en la forme et dans les conditions réglementaires d'après la loi locale, ont le même effet et la même valeur que s'ils avaient été faits par des officiers publics à terre, dans l'étendue de leurs circonscriptions locales."

The regulation of the penal jurisdiction of the riparian State is a more complex question, because the dominant *prima-facie* conception of the scope of a riparian State's power of dominion has been the subject of important reservations in practice. These reservations relate to an historical decision of the French Conseil d'Etat, referred to in the following quotation:

"Distinguant entre les faits qui se passent sur ces navires, il a proclamé les solutions suivantes: (1) Le navire étranger admis dans un port français est soumis à la compétence de la juridiction française pour tout ce qui touche aux intérêts de l'Etat, pour les lois de police et pour les délits commis, même à bord, par des gens de l'équipage envers des personnes étrangères à celui-ci; (2) Le navire étranger échappe, au contraire, à la compétence de la juridiction française et est soumis à celle des autorités de son propre pays pour les actes de pure discipline intérieure et pour les délits commis à bord de la part d'un homme de l'équipage envers un autre homme du même équipage, ces délits présentant une analogie avec les faits de discipline intérieure; (3) Toutefois, l'autorité locale a le droit d'intervenir pour les actes commis à bord entre gens de l'équipage, si son secours est réclamé ou si la tranquillité du port est compromise."

It must, however, be recognised that the principle admitted by the Conseil d'Etat has not gained universal acceptance. The British Territorial Waters Jurisdiction Act of 1878, already quoted, is diametrically opposed to it and extends the legal competence of the riparian State in the matter of penal jurisdiction not merely to offences committed on board foreign vessels passing through the territorial sea but also to foreign vessels in maritime ports. This theoretical attitude is weakened in practice by the fact that in every case a request by one of the principal Secretaries of State is a *sine qua non* of criminal prosecution for an offence committed on board a foreign vessel in a British port. The fundamental rule of the British system has been applied in more concrete fashion in the legislation of certain Latin-American countries and in the codification project of the American Institute of International Law.

In international practice, therefore, there is no universally accepted legal conception, though it would undoubtedly be desirable to establish such unanimity by means of a convention. We must therefore decide in favour of one of the three systems in vogue. (For the practice of States, see FAUCHILLE, *op. cit.*, pp. 1027–1057.) The theory of the unlimited competence of the riparian State is more logical, but practical considerations urge the general recognition of the French system. A foreign vessel in a port generally wishes to leave the port as soon as possible, and not to enter into relations with the authorities of the riparian State except so far as is absolutely necessary in order to fulfil certain official formalities. It does not seem equitable to impose obligations on foreign vessels in this connection as the result of an offence which has had no effects outside the vessel itself. Moreover, the punishment of the offender has been provided for, inasmuch as the captain of

the vessel is authorised to take the necessary steps for instituting a criminal prosecution. Most countries still endeavour to preserve their nationals from the criminal jurisdiction of foreign courts; we may mention, by way of example, the rules for the non-extradition of nationals, which are often even embodied in constitutions. All these considerations can be given their due weight if the French system of restricting the penal jurisdiction of the riparian State is followed. The recognition of this principle would entail little alteration in international practice, for, as we have pointed out, it is only a few American States which take a different view in practice.

The action which can be taken by the port authorities with a view to the criminal prosecution of the crew and passengers of a foreign vessel may be very simply defined. Within the limits of the riparian State's criminal jurisdiction in maritime ports, it can take all steps with a view to criminal prosecution which the exercise of that jurisdiction may dictate. In this connection, various writers have dealt with the question of asylum, namely, the question whether the captain of a foreign vessel in a port has the right to receive on board, and to protect from pursuit by the port authorities, refugees who are nationals of the riparian State. It may be asked whether such refugees, when received on board foreign vessels, can be arrested and whether the captain is liable to criminal prosecution. Doctrine and international practice are agreed that no such right of asylum exists for persons wanted by the official authorities of the riparian State.

See FAUCHILLE, *op. cit.*, pp. 1066 *et seq.* This work also contains the 1897 and 1898 projects of the Institut de Droit international, together with an exhaustive account of international practice.

FENWICK, *op. cit.*, pp. 199 *et seq.* "Foreign merchantships, not being exempt, except by comity, from the jurisdiction of the State in whose ports they drop anchor, may not be made an asylum for fugitive, criminal or political refugees. It has been questioned, however, whether a foreign merchantship is so far under the jurisdiction of the State as to give the local authorities the right to enter upon the vessel and arrest a passenger who, as a political refugee, has taken passage upon the vessel in the port of a third State. Calvo relates the case of one Sotelo, a political refugee, who took passage in 1840 on board a French vessel at one Spanish port and was arrested upon the arrival of the vessel at a second Spanish port. In the case of Gomez, a political refugee from Nicaragua, who took passage on board a United States steamship in the harbour of Guatemala in 1888, and whose arrest was sought by the local authorities when the vessel stopped en route at the port of Nicaragua, the Department of State refused to support the action of the captain in declining to deliver the passenger. 'It is clear,' said Secretary Bayard, 'that Mr. Gomez voluntarily entered the jurisdiction of a country whose laws he had violated. Under the circumstances, it was plainly the duty of the captain of the "Honduras" to deliver him up to the local authority upon their request.' In contrast to the ruling in the Gomez case, Secretary Blaine contested, in 1890, the right of the Government of Guatemala to demand the surrender of Barrondia, a political refugee who had taken passage on board a Pacific Mail steamer at a Mexican port, and who was temporarily within the jurisdiction of Guatemala when the vessel called at a port en route. In a later case, involving a political refugee from Honduras, named Bonilla, Secretary Gresham, while admitting the right of the local authorities to demand the surrender of a passenger, instructed the American Minister to protest against the act

of the commander of the port in firing upon the vessel whose captain refused to surrender the refugee."

There has been some uncertainty as to political offences. (See FAUCHILLE, *op. cit.*, pp. 1070 *et seq.*) So far, no unanimous legal doctrine has been established to the effect that political offenders possess such a right of asylum. (See the *Sarvarkar-Kohler* case in SCHÜCKING, *Das Werk vom Haag*, Vol. 5, pp. 65 *et seq.*)

The following article should therefore be included in the Convention:

"*Jurisdiction over foreign merchant vessels in maritime ports.*

"*Article* 13.—In maritime ports foreign merchant vessels shall be subject without restriction to the civil and non-contentious jurisdiction of the riparian State.

"The criminal jurisdiction of the riparian State shall be restricted to the punishment of offences committed on board which are not directed against a member of the crew or against passengers and their property. Its criminal jurisdiction shall further be restricted to cases in which the captain of the vessel has asked the port authorities for assistance and cases in which the peace or public order in the port has been disturbed."

### *XVI. Settlement of Disputes*

If the Convention proposed by us were accepted, we should still have to reckon with the possibility of disputes arising in connection with its application and interpretation. Such disputes between States could be regarded in all circumstances as purely legal disputes, which could be settled without exception by an award of a court of arbitration. No State could contend that the jurisdiction of a court of arbitration in disputes arising out of the application or interpretation of this Convention would endanger its independence, its honour or its vital interests. We therefore think it desirable that the Convention itself should provide for the compulsory settlement of all disputes, and we have only to consider how this recommendation can be carried into effect. It might be possible to confer the sole competence on the Permanent Court of International Justice. (See the conventions in which the Permanent Court has been declared exclusively competent to deal with all disputes—SCHÜCKING and WEHBERG, *Die Satzung des Völkerbundes*, 2nd edition, pp. 521–531.) It would, however, we think, be more satisfactory and more liberal to leave the parties to the dispute free to submit it either to the Permanent Court of International Justice or to a special court of arbitration. In accepting this latter method, we should simply be following the example given by a whole series of international conventions. (These are enumerated in the work mentioned above—SCHÜCKING and WEHBERG, *Die Satzung des Völkerbundes*, 2nd edition, p. 531.)

In such cases the parties to the dispute would have the option of bringing it before the mixed commission which we propose should be attached to the

International Waters Office to settle disputes arising ot of registration as mentioned above.

Accordingly, Article 14 of the Convention would rea as follows:

"*Settlement of Disputes.*

"*Article* 14.—All disputes arising out of the appcation or interpretation of this Convention shall be subject to compulsry settlement by the Permanent Court of International Justice or by court of arbitration constituted by agreement between the parties."

* * *

The Rapporteur trusts that his examination of he question and his proposals will furnish the Sub-Committee with a seful groundwork for discussion. He cannot conclude without expressing is heartiest thanks to his secretary, M. Paul Guggenheim, Doctor of Law, who has afforded him such great and devoted assistance in composing this eport.

| | General Zone | Fishing | Customs | Neutrlty | Jurisdiction | Public Safety |
|---|---|---|---|---|---|---|
| Brasil | | | | 3 mes | | |
| Belgium | | 3 miles | 1 myriametre | | 3 miles | |
| Chile | | | | 5 mes | | |
| Denmark | 1 league | 1 league and 3 miles | | | | |
| Spain | | 6 miles | 6 miles | 6 nles | 6 miles | |
| United States of America | | | 3 miles | 3 riles | | |
| France | | 3 miles | 2 myria-metres | 6 riles | | Radius 1 myriametre |
| Great Britain | | 3 miles | 3 miles | 3 niles | 1 marine league | |
| Greece | | 3 miles | 6 miles | | | |
| Italy | | | 5 and 10 kms. 12 miles | | | Cannon range |
| Norway | | 1 league | 10 marine leagues | | | |
| Netherlands | | | | 3miles | | |
| Portugal | | 3 miles and 6 miles | 6 miles | | | |
| Germany | | 3 miles | 3 miles | 3 miles | | 3 miles |
| Russia | 4 miles generally | | 12 marine miles | | | |
| Sweden | | 1 league | 1 league | 1 league | | |
| Uruguay | | | | 5 miles | | |

DRAFT CONVENTION

ARTICLE 1

*The character and extent of the rights of the riparian State.*

The State shall have an unlimited right of dominion over the zone which washes its coast, in so far as, under general international law, the rights of

common user of the international community or the special rights of any State do not interfere with such right of dominion.

The right of dominion shall include rights over the air above the said sea and the soil and subsoil beneath it.

ARTICLE 2

*Extent of the rights of the riparian State.*

The zone of the coastal sea shall extend for six marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast.

The rights of other states which have been exercised by virtue of the common right of user of the high seas or of special treaties shall not be affected. States may exercise their rights of dominion by virtue of usage, and within the limits of such usage, beyond the zone of dominion in the following domains: the police measures to prevent the possibility of military exercises being carried out by other States, and measures of Customs and sanitary control. Other rights beyond the zone of dominion may only be accorded to the riparian State by the body mentioned in Article 3 if they are demonstrated to be urgently necessary. Such grant shall in no case include rights of exclusive economic user outside the territorial sea.

ARTICLE 3

*International Waters Office and registration in the International Waters Register.*

The States signatory to the Convention undertake to establish an International Waters Office.

The duty of this Office is to compile a register of rights possessed by the different States in the fixed zone of foreign riparian States, or by the riparian States themselves outside the fixed zone.

The registration of a right in the International Waters Register kept by the International Waters Office in favour of any State in a foreign territorial sea shall be in favour of all States, if such right is founded upon common usage.

A time-limit of . . . shall be fixed by the International Waters Office for the submission of all applications for such rights, as also for rights claimed by a riparian State outside its fixed zone by virtue of usage.

The relevant legal instruments must be presented and registered. The onus of proof shall be upon the State applying for registration of a right in its favour. Applications must be communicated to all the States parties to the Convention.

Applications may be opposed within a time-limit to be fixed. If an application is opposed, the question is decided, in the first instance, by a mixed commission of experts and jurists. Appeal lies from decisions of this com-

mission to the Permanent Court of International Justice. All States shall be informed of the registration of a right. The register shall be published.

The same procedure shall apply in cases in which a State claims to have an urgent new need outside the sphere of its dominion over the territorial sea. It must apply to the International Waters Office, which may only grant a right after publication of the application, and provided that it is not opposed. In the event of opposition, the question shall go before a mixed commission, before which the State claiming the right must prove that it cannot otherwise protect the interests affected. In this case also, appeal lies to the Permanent Court of International Justice.

The International Waters Office shall also be responsible for publishing maritime charts showing the zones of the territorial sea.

### Article 4

*Bays.*

In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea, where the distance between the two shores of the bay is 12 marine miles, unless a greater distance has been established by continuous and immemorial usage.

In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.

As regards the recognition of rights which are in contradiction with the tenor of the general rules, the provisions of Article 3 concerning presentation and registration in the International Waters Register shall be applicable. It shall not be possible to acquire such rights in the future.

### Article 5

*Islands.*

If there are natural islands, not continuously submerged, situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself.

### Article 6

*Straits.*

The region of straits at present subject to special conventions is reserved.

In Straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line.

ARTICLE 7

*Pacific passage.*

All vessels without distinction shall have the right of pacific passage through the territorial sea. In the case of submarine vessels, this right shall be subject to the condition of passage on the surface. The right of passage includes the right of sojourn in so far as the latter may be necessary for navigation. For the sojourn of warships, see Article 12.

The right of free passage includes the right of passage for persons and goods independently of the right of access to the foreign mainland.

ARTICLE 8

*Coasting trade.*

A riparian State has the right of reserving for its own flag the transport of passengers and goods loaded at one port situated under its authority and unloaded at another port also situated under its authority. A State which does not reserve the above-mentioned transport to its own flag may nevertheless refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does reserve it.

ARTICLE 9

*Jurisdiction.*

Vessels of foreign nationalities passing through territorial waters shall not thereby become subject to the civil jurisdiction of the riparian State.

Further, crimes and offences committed on board a foreign vessel passing through territorial waters by persons on board such vessels against persons or things also on board shall, as such, be exempt from the jurisdiction of the riparian State.

Offences, the consequences of which are not confined to the vessel or the persons belonging to it, are subject to the criminal jurisdiction of the riparian State, in so far as they constitute offences against its established law and its tribunals have competence to deal with them.

ARTICLE 10

*Regulations.*

Within its territorial waters, the riparian State shall have the power of legislation and administration for the following purposes: regulation of navigation, preservation of marine signals and lighthouses, prevention of shipwreck, regulation of pilotage, protection of submarine cables, regulation of Customs, inspection including the inspection of prohibited imports and exports, supervision of fisheries, health control, assistance at sea and collisions.

The riparian State shall have the right to extend its legislative and ad-

ministrative action to other domains when interests deserving of its protection in territorial waters are affected.

Within the limits of the riparian State's right of legislation and administration, it shall be granted also the right to employ the necessary means of constraint to enforce its jurisdiction in order that it may be able to deal with offences.

The riparian State shall have the right to continue on the high seas the pursuit of a vessel commenced within its territorial waters and to arrest and bring before its Courts a vessel which has committed an offense within its territorial waters. If, however, the vessel is captured on the high seas, the State whose flag it flies shall be notified immediately. The pursuit shall be interrupted as soon as the vessel enters the territorial waters of its own country or of a third Power. The right of pursuit is extinguished as soon as the vessel has entered a port of its own country or of a third Power.

Within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration. Such dues or charges shall be levied under conditions of equality.

All regulations issued by riparian States regarding their territorial waters shall be registered and published by the International Waters Office.

### Article 11

*Riches of the sea, the bottom and the subsoil.*

In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil.

### Article 12

*Warships.*

The exercise by warships of the right of free passage may be subjected by the riparian State to special regulations. Foreign warships when admitted to territorial waters must observe the local laws and regulations, particularly those relating to navigation, anchoring and health control. If a serious and continued offence is committed, the commander of the vessel shall receive a semi-official warning in courteous terms and, if this is without effect, he may be requested, and, if necessary, compelled, to put to sea. The same dispositions shall apply if the local authorities consider that the presence of the vessel threatens the safety of the State. Except in cases of extreme urgency, however, these stringent measures shall only be taken upon the instructions of the central Government of the country.

In the case of minor offences, the diplomatic channel shall be used.

### Article 13

*Jurisdiction over foreign merchant vessels in maritime ports.*

In maritime ports, foreign merchant vessels shall be subject without restriction to the civil and non-contentious jurisdiction of the riparian State.

The criminal jurisdiction of the riparian State shall be restricted to the punishment of offences committed on board which are not directed against a member of the crew or against passengers and their property. Its criminal jurisdiction shall further be restricted to cases in which the captain of the vessel has asked the port authorities for assistance and cases in which the peace or public order in the port has been disturbed.

ARTICLE 14

*Settlements of disputes.*

All disputes arising out of the application or interpretation of this Convention shall be subject to compulsory settlement by the Permanent Court of International Justice or by a court of arbitration constituted by agreement between the parties.

(*Signed*) Dr. Walther SCHÜCKING,

*Professor of Public Law, Member of the Permanent Court of Arbitration, Member of the Reichstag, Member of the Institut de Droit international, Corresponding Member of the American Institute of International Law.*

## II. OBSERVATIONS BY M. BARBOSA DE MAGALHAES

[*Translation.*]

### *I. Introduction*

As I was unable to read the excellent report by our colleague Professor Schücking before it was printed, I am venturing to submit now, for the enlightened consideration of the Committee, the observations suggested to me by that report, in order to defend my views, which, although perhaps not differing in essentials from those of the distinguished Rapporteur, nevertheless diverge from his views on certain important points.

In doing this, I propose to take in the same order the problems which are considered and discussed in the report, and solutions for which are proposed in the project accompanying it, but I shall only touch upon those in respect of which I feel that an explanation of my views is necessary.

In the first place, I desire to state that, in my opinion, the question of the territorial sea is one of those which call most urgently for a solution by way of convention, and that such solution is at the same time perfectly feasible, notwithstanding the important divergencies noticeable alike in doctrine, internal legislation, international usage, conventions and treaties.

These divergencies are not fundamental, and, moreover, it is not difficult to discover certain tendencies towards uniformity. Although the establishment of uniformity may encounter certain obstacles, arising out of the economic interests of certain States, it does not, strictly speaking, constitute a political problem.

It should be added that the divergencies with regard to the solution of certain problems are often due to the absence of unanimously accepted and recognised principles of international law and to the resultant diversity in internal legislation and in treaties rather than to the existence of clear-cut opinions which it is sought to maintain at all costs.

### *II. The Legal Status of Territorial Waters*

The eminent Rapporteur, in his short but adequate review of the theories which have been put forward as to the legal status of territorial waters—theories which he agrees with FAUCHILLE in dividing into two general categories—expresses himself in favour of that which is based upon the idea of the dominion of the coastal State over the territorial sea, adding, however, that this dominion must be restricted by certain rights of common user in favour of other States and by the provisions of such treaties as may have been concluded by the coastal State.

In accordance with this idea, he proposes the following text for Article 1 of his project:

> "The State shall have an unlimited right of dominion over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such right of dominion.
>
> "The right of dominion shall include rights over the air above the said sea and the soil and subsoil beneath it."

I am in agreement with the idea but not with the proposed article.

First, it seems to me that the expression "unlimited right" does not answer to the facts, seeing that there are no unlimited rights, and, further, that it is not in harmony with the rest of the article: this right is so far from being unlimited that it is found necessary to add immediately afterwards that it is subject to the restrictions imposed by the rights of common user of the international community or by the special rights of any State.

The word "unlimited" is, moreover, superfluous from every point of view.

The actual provisions of the project must be referred to in order to ascertain the extent of this right of dominion.

*I propose, therefore, the deletion of this word.*

*I also propose the deletion of the restrictions mentioned in Article* 1. I do not mean to suggest by this that these restrictions do not exist, but I consider that it is not necessary to mention them in this generic form in Article 1, and that to do so could only cause difficulty.

Those restrictions which are constituted by the rights of common user of the international community should be clearly and explicitly stated in the draft, and they are in fact to be found there—if not all of them, at any rate the chief ones. If they are not all mentioned there, and if it is considered that any others should be mentioned, the omission should be made good in

order to avoid difficulties and controversies in the future, that being the essential object of the draft.

As regards the restrictions arising out of the special rights of any State, it is not necessary either to mention them or to make a reservation in regard to them, for, if they are laid down in conventions or treaties which are binding upon the parties, it is obvious that they are not affected by the general law, that is to say by the convention drawn up as a result of the discussions on the draft.

Consequently, it seems to me that Article 1 would gain much in clarity and simplicity if it were drafted as follows:

> *"The State shall have a right of dominion over the zone which washes its coast and over the air above the said sea and the soil and subsoil beneath it."*

### *III. The Extent of the Territorial Sea under the Dominion of the Coastal State*

This is the question which gives rise to the greatest number of divergencies, and which, as the report observes, is the most difficult to solve: it is at the same time the one in respect of which a uniform solution is the most necessary.

It involves various problems, three of a general character and some others of a special character.

The general problems are as follows:

(*a*) Should the extent of the territorial sea always be the same, or should it vary according to the rights and obligations of the coastal State?

(*b*) What is this extent to be if it is to be uniform, or, if it is to vary, how many zones must be established and what special rights or obligations must be attached to them?

(*c*) From what point must the zone or zones constituting the territorial sea be reckoned?

There are various special problems, some of which are referred to in detail later in the report.

(*a*) If the solution of the first of these problems is to be in harmony with the theory of the dominion of the coastal State over the territorial sea, it must consist in the establishment of a uniform limit for the territorial sea, or of a single zone to constitute it.

It is indeed incomprehensible that there should be so great divergencies in connection with this right of dominion as are at present to be found in doctrine, in internal legislation and in treaties.

To establish several zones with successive restrictions on the right of dominion of the coastal State is like building a staircase with a certain number of steps leading from the coast to an extreme point where there would merely be a vestige of dominion.

One can understand that the right of dominion should be subject to certain restrictions, but this is not, strictly speaking, a question of restrictions; it is proposed to limit the right of dominion (which is in any case attenuated by natural circumstances) to a very small number of manifestations, if not to one only.

If this line is followed, the views taken by States will be as numerous and as diverse as those of the publicists and as the solutions adopted in internal legislation and in treaties.

Moreover, inasmuch as States have rights to exercise and obligations to fulfil in the territorial sea, it is not desirable that there should be different areas for the exercise of all or any of the rights and for the fulfilment of all or any of the obligations; there must be correlation. For example, the monopoly of fishing and of the coasting trade for nationals should have as a corollary the obligation to exercise supervision and to preserve order and safety within the same area. It is illogical that a State should have the obligations in respect of a three-mile zone and the rights in respect of a six-mile zone, or *vice versa*.

The draft establishes a general zone of six marine miles; but it also establishes another zone, without any fixed or uniform limit, in the following terms:

> "States may exercise their rights of dominion by virtue of usage, and within the limits of such usage, beyond the zone of dominion in the following domains: police measures to prevent the possibility of military exercises being carried out by other States, and measures of Customs and sanitary control."

In this second zone yet other rights may be exercised beyond the zone of dominion and without restriction of area, if they are accorded by the International Waters Office in consideration of proved and urgent necessity.

But, it will be asked, what is the legal character of the right of coastal States in this second zone? Is it still a right of dominion? If so, why is it more restricted than in the first zone? And why is its exercise conditional upon a declaration by the International Waters Office? If it is not a right of dominion, it is desirable to establish its legal character, if only in order that the usage and urgent necessity upon which the coastal States base their claims to it may be appreciated.

Whatever the position may be, it seems to me that the recognition of this right based upon usage, and the consequent existence of two zones, will give rise to difficulties and controversies which it is desirable to avoid; in my opinion, there ought to be only one zone, without prejudice to the power which the International Waters Office might exercise as an exceptional measure, not, as the draft under consideration provides in Articles 2 and 3, to accord rights in consequence of some urgent and sudden necessity, but, as

the ALVAREZ draft provides,[1] to authorise the coastal States to occupy the area of water necessary for the establishment, for a given period, of installations designed to serve one of the following purposes of general interest, viz.:

(1) Bases for non-military aircraft;
(2) Wireless telegraphy stations;
(3) Submarine-cable stations;
(4) Lighthouses;
(5) Scientific research;
(6) Stations for assisting the victims of shipwreck.

*I prefer this provision of the* ALVAREZ *draft to that of the* SCHÜCKING *draft, because it is more explicit.*

*I also prefer that there should be a single zone*, not merely for the reasons briefly set forth above, but also because I would suggest that the single zone should be greater in extent.

(*b*) It is well known that the opinions which have been held and the solutions which have been proposed with regard to the extent of the territorial sea are very varied; this is made clear in the report, both by the text and by the table which follows it; we may accept the statement of M. BOYÉ [2] and M. Johan HJORT [3] that there is no generally acknowledged usage or principle in international law with regard to territorial waters. It may, however, be observed that there are two opinions and solutions which have met with most acceptance: one establishing a fixed limit of three miles, and another establishing the variable limit of gunshot range; moreover, the latter limit has sometimes been assimilated to the former, that is to say, it has been presumed that gunshot range would not exceed three miles.

To-day, owing to improvements in artillery, this variable limit exceeds three, and even six or twelve, miles. In the recent draft conventions the limit is fixed at six miles; it should be noted, however, that some of them, such as the ALVAREZ (1924) and SCHÜCKING drafts, provide for a second zone; another (Captain STORNY's draft) lays it down that "en général" the maximum limit of the territorial sea shall be six miles; another (the draft of the Institut de Droit international) provides that the limit of the territorial sea shall be six miles, but may be extended in time of war as far as gunshot range; while yet another (the 1924 draft of the American Institute of International Law) establishes a supplementary area . . . marine miles in width (the figure is not stated), "for reasons of safety and in order to assure the observance of sanitary and similar regulations."

This shows the tendency towards the extension of the territorial sea—an extension which is fully justified by the conditions of modern life: the greater

[1] Draft for the Regulation of Maritime Communications in Peace-time, submitted to the Stockholm Conference of the International Law Association in 1924.

[2] "*Territorial Waters, with Special Reference to Norwegian Legislation*," memorandum presented to the Stockholm Conference of the International Law Association in 1924.

[3] "*The Principal Facts concerning Norwegian Waters.*"

rapidity of transport, the increase and greater efficacy of the means of action at the disposal of States,[1] the necessity of employing these means of action in a constantly growing area, especially as regards certain fields of activity such as police measures for purposes of protection and of Customs and sanitary control (SCHÜCKING and ALVAREZ drafts and drafts of the Institut de Droit international), the protection of maritime navigation and scientific research (ALVAREZ draft), the exclusive utilisation of vegetable or mineral products, and, more particularly, the maintenance of exclusive fishing rights.[2]

As regards the last-named category of exclusive rights, the extension of the territorial sea has been demanded with insistence at recent national and international fishery congresses.

The Fishery Congress of 1898, at Bergen, recommended that the limit of the territorial sea should be fixed at ten miles, and for certain purposes at six miles.

At the Congress of the International Marine Association held at Lisbon in 1904, Sir Thomas BARCLAY drew attention to the inadequacy of the three-mile limit; the nations which had interests in the North Sea, with the exception of Great Britain, were unanimous in considering that the territorial sea should extend for eight or ten miles; the Spanish delegate, NAVARRETE, stated that in his country the fishermen in the north and north-east were asking that the territorial sea should extend for twenty miles; the Russian delegate proposed that it should extend for ten miles; and the United States of America suggested eleven miles.

At the Fifth International Fishery Congress, held at Rome in 1911, Alberto CASTANO proposed that the minimum extent of territorial waters should be fifteen miles.

At the National Fishery Congress held at Madrid, in 1916, Odon DE BUREN, who is now Director-General of Fisheries in Spain, urged the necessity of extending the territorial sea to include the whole of the continental shelf.

At the Basque Fishery Congress which was held at St. Sebastian from September 22nd to 25th, 1925, a resolution was passed to the effect that the Spanish and French Governments should come to an agreement to extend the

[1] FAUCHILLE, after asking the question: "les progrès de la science, et spécialement les progrès de la science aéronautique, ne devront-ils pas avoir nécessairement une influence sur la détermination de la mer territoriale?" reproduces passages from the article entitled "L'Aviation sur les eaux territoriales," published by M. Henry COUANNIER, in the *Revue juridique internationale de la Locomotion aérienne*, Vol. IV, pp. 252 *et seq.*, and concludes as follows: "Pour être logique jusqu'au bout, c'est donc, d'après M. Henry Couannier, cette portée (celle de la vue d'un avion) qu'il faudrait admettre comme mesure de la zone territoriale; et ainsi la longueur de cette zone devrait être d'environ 15 milles, au lieu de 6."

[2] It should be mentioned here that the necessity of extending the zone of the territorial sea in case of war has also been recognised (1894 draft of the Institut de Droit international).

Although, according to a statement by the Committee, we are not called upon for the moment to consider the codification of the public international law of war, that aspect of the problem ought not to be forgotten.

littoral zone of the two countries to a distance of twelve to fifteen miles from the coast with a view to ensuring the mutual observance of the regulations issued by each of the two Governments concerning intensive methods of trawling.

These demands are fully justified by technical considerations.

The maritime species of fish, particularly the edible varieties, are not uniformly distributed throughout the whole sea. Whether they are sedentary or migratory, their biological characteristics demand special conditions which, generally speaking, are only to be found together in proximity to the coast or at a relatively short distance therefrom. These conditions consist principally in the light, the salinity and the temperature of the water, its depth, the abundance and good quality of the plankton and of the vegetable growths suitable for the deposit of the eggs, and yet other considerations. It goes without saying that all this has only been discovered by biologists in comparatively recent times, inasmuch as research work only became intensive in the second half of the nineteenth century, and there is still much that requires verification. What fishermen knew, however, because they had occasion to notice it every day, was that those edible varieties of fish which were to be found quite near the coasts did not inhabit the high seas.

At one time a notion of an essentially geomorphological nature gained credence. It was observed that at a certain distance from the coast—a distance which varied to some extent—the bottom of the sea is marked by a sort of great step, almost always abrupt, which divides it into two quite distinct regions. The region extending from this step to the coast-line has been called the "continental shelf." The other, much vaster, which extends beyond this step, is the abysmal region; the rare species of fish found in this region are generally inedible. On the other hand, those which inhabit the continental shelf are for the most part edible.

As has already been observed, the width of the continental shelf is very variable. On the Atlantic coast of the Iberian Peninsula it is small in comparison with that of the continental shelves of France, England and other northern European countries. The following conclusions may be drawn from these facts:

(*a*) Edible varieties of fish are crowded together, so to speak, near the coasts of the countries whose continental shelf is narrow, whereas they are scattered about the high seas off coasts whose shelf is more extensive;

(*b*) Consequently fishing is more sought after on narrow shelves because it is more fruitful there than elsewhere.

As long as fishing was more or less restricted and there was an abundant supply of the various species, it was a matter of virtual indifference to the fishermen of each country that foreign fishermen should share the abundance with them; the sea sufficed for all. But now that circumstances have changed, it is felt to be necessary to make corresponding changes in the

existing situation and to extend the zone of the territorial waters in order that the exclusive enjoyment of fishing rights may not become merely theoretical in the case of certain States.

The question must also be considered in another aspect, which is extremely important if one of the desiderata of the Committee, namely, the protection of maritime wealth, is to be realised.

Apart from the question of exclusive fishing rights, it is the duty of all coastal States, both in their own interests, in order that they may obtain the greatest possible benefit from these exclusive rights, and in the general interest of world trade, to take the necessary steps for the protection of fish.[1]

Admiral ALMEIDA D'EÇA, Portuguese delegate to the Seventh International Fishery Congress, which was to have been held at Santander in 1921 but did not take place, said:

> "It is a well-known fact that the edible species of fish, whether sedentary or migratory, have their habitat in comparatively shallow water; the great depths are inhabited by abysmal species, which are not edible. It is in shallow water that the conditions necessary for the normal existence of the edible species—temperature, light, plankton and shelter—are all favourable.
>
> "As, of course, the shallow water is to be found near the coasts, the edible species live or swim about there. The reason why species suitable for fishing are to be found on banks remote from the coasts is simply that, in spite of the distance, the depth of the water is not great. In other words, depth is a vital factor in the conditions affecting the edible species.
>
> "Having established this connection between shallow water and the existence of edible species, we can see what has happened and was bound to happen. Sea-fishing is carried on either near the coasts or on banks. This has been the practice from time immemorial and is still the practice; and, as it was assumed that the various species were inexhaustible, fishing was carried on without respite, improvements being continually made in the apparatus employed for catching the greatest possible quantity of fish. The same activity was displayed in rivers; but in this case its destructive effects were recognised more quickly, and consequently, in our own country as elsewhere, restrictive measures are to be found in legislation from the Middle Ages onwards. As regards the sea, however, it is fair to say that until the nineteenth century there was no recognition whatever of the need for protecting species, that is to say, for issuing and enforcing regulations (as to seasons, apparatus, width of mesh, use of harmful substances, dynamite, etc.) to moderate

[1] In the treaties of October 2nd, 1885, and March 27th, 1893, Spain and Portugal mutually agreed that fishing within a limit of six miles should be reserved exclusively to the nationals of each of the two countries and that the use of destructive appliances should be prohibited within a limit of twelve miles.

the destructive intensity of fishing. This necessity became increasingly evident as the quest for fish grew more intensive, owing to improvements in apparatus, the growing demand of the markets, better land-transport facilities, and finally the entirely new industry of preserving in airtight receptacles, which, together with the earlier industries of salting and pickling, called for a greater quantity of fish every day. Thus arose the practice of taking all kinds of fish, whether full-grown or quite small, because all were consumed, either fresh or preserved, and the factories were continually calling for more. Ultimately—though it took time—it was realised that some limit should be set to this intensive fishing; and countries then began to lay down regulations for their fishermen, which, it must be admitted, the latter did not, and perhaps do not yet, view with favour. They regard them as vexatious restrictions on their activity, whereas they are really made in their own interests, since the whole object is to avoid exhausting such a profitable source of wealth.

"But—and this is the difficult point—regulations of this kind are almost useless if they are not widely enough applied. Every State can legislate for its own fishermen, and decide what they may or may not do, in its own territorial waters; it can even, up to a certain point, prevent irregular fishing by them outside its territorial waters, by inspecting the apparatus on the boats before they put out to sea and the catch when they bring it back to port. This control, however, can be exercised by the State only over its own nationals; over foreigners it has no power outside the so-called territorial waters. The outer limit of territorial waters, as now recognised, does not, however, coincide with the greatest depth at which edible species of fish are to be found. There is no barrier, no wall, separating territorial waters from the high seas, where fishing is free to all. For the edible species the barrier is the drop from the continental shelf; they are not to be found beyond this line; but if the geographical position of the drop does not coincide with the limit of the territorial waters, they are to be found beyond that limit, and are then exposed to all the methods which lead to their extermination and destruction. Whereupon the fishermen of each country quite reasonably say: 'What is the meaning of this? My Government will not let me fish in such-and-such a way within a certain limit or even beyond, while foreigners can fish as they like outside the limit. They take all the fish, and there is nothing left for us.'

"That is the principal and most important reason for considering it necessary to extend the outer limit of the territorial waters of each country *for the purposes of fishing*. By this method alone can each country really ensure the protection of species.

"It will be seen, therefore, that, in the delimitation of territorial waters from the point of view of fishing, two main factors—the fauna peculiar to each region and its depth—must be taken into consideration.

It follows that regulations, if established on a scientific basis, cannot be uniform for all countries. Portugal, as regards the whole of her coast-line, and Spain, as regards part of hers, are the two European countries which need the greatest width of territorial waters, because they have the narrowest continental shelf, beyond which, as has been pointed out, edible species do not live. In northern Europe, Norway is in substantially the same position."[1]

Moreover, the work of protecting species will be much more effective if it is done by each State in its own territorial waters than if it is done by some international organisation to which it might be entrusted by convention.

There would thus be this general advantage in increasing the extent of the territorial sea.

*I therefore propose that a single zone be established for the territorial sea.* This solution is, in my opinion, consonant with the circumstances and tendencies of our time, and at the same time simpler and better calculated to avoid complications and disputes; it is free from objection (for it will profit all coastal States alike while in no way affecting the position of non-coastal States) and it offers definite advantages.

I would accordingly word Article 2 of the draft as follows:

"*The zone of the coastal sea shall extend for twelve marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast.*

"*Beyond this zone, riparian States of the sea possessing a navy or merchant marine may occupy such area of the high seas as is necessary for the establishment of permanent or other constructions, provided that these are intended for any of the following public purposes:*

"(1) *As bases for non-military aircraft;*
"(2) *For wireless stations;*
"(3) *For submarine-cable stations;*
"(4) *For scientific research;*
"(5) *To provide assistance for shipwrecked mariners;*
"(6) *For searches for wrecks or treasures.*"

Immediately following this Article 2, I would have two other articles:

"Article 2 (a).—*It is expressly forbidden to fortify the constructions referred to in the preceding article, or to use them even indirectly as bases of supply for warships or war aircraft or for submarines.*

"Article 2 (b).—*These constructions must be approved in advance by the International Waters Office, and shall be under its immediate control. The Office shall order the immediate demolition of any works set up in contravention of the provisions of the preceding article.*

[1] *As águas territoriais e as pescas.* Memorandum to the Seventh International Fishery Congress, Santander, 1921, by Vicente Almeida d'Eça, delegate of the Portuguese Government, p. 11.

*"The State committing such infringement may further be sentenced to a fine to be determined by the Commission."*

*As a necessary consequence, I would amend Article* 3 *of the* SCHÜCKING *draft in accordance with the foregoing exposition.*

This wording of Article 2 defines the inner and outer limits of territorial waters, and thus solves the third general problem to which we refer above.

We have still, however, to determine the lateral limits of territorial waters. This is not done in the SCHÜCKING draft, but the problem is touched upon in Section VII ("Common Land Frontiers") of the report.

In describing the two general solutions which could be given to this problem, the Rapporteur is anxious that the matter should not be dealt with in the proposed Convention, and that, as regards existing States, historical rights should be the deciding factor; in the case of a political change in the frontiers between coastal States, he thinks that it would be advisable to establish special rules in each case, the new frontier being determined with due regard for the special geographical circumstances. He thinks it preferable to let the States concerned conclude a special agreement and apply for the decision of an arbitral or other tribunal, rather than to establish an immutable principle.

As regards the second hypothesis, I share his view, though I feel that, if the lateral limits of the territorial sea were defined in the Convention (as I think they can and should be), the same rules could be applied in certain cases of changes of frontier between two coastal States.

What I do not see, however, is why these rules could not be embodied in the Convention. I think this ought to be done.

Accordingly, I would include in the draft a clause containing a general definition of the lateral limits of the territorial sea in the following terms.

"Article 2 (c).—*The limit between the territorial waters of a State and those of another contiguous State is constituted by a line drawn perpendicular to the coast from the point at which the frontier between the two States meets that coast.*"

I would also introduce another clause covering and regulating the special case in which the frontier between the coastal States is formed by a river.

It is recognised that the line which divides the inland course of a river between two States is not the median line between the two banks, but the line of the "thalweg," *i.e.*, the line of the greatest depth. It is now known that the river does not actually come to an end at its mouth, but continues a little way into the sea, running over an *exterior bed*, which is almost always defined by banks on either side, and which also has its thalweg (*exterior thalweg*).

This line of the greatest depth is the course followed by vessels entering the estuary or leaving it for the sea; in many cases, indeed, it is marked for the use of shipping by buoys or beacons, the cost of which is borne by the two neighbouring States.

The bar is the common property of both States, and, consequently, vessels leaving the river ports of either of them, or entering from the high seas, are entitled to cross the bar, though, as we have pointed out, they have to follow the line of the *exterior thalweg*.

Clearly, therefore, in such a case it is the line of this *exterior thalweg*, and not a straight line drawn from the point where the bar is divided into two, which should form the lateral limit of the territorial waters of the two neighbouring States.

If this were not the case, the bar, though remaining in law under the common dominion of the two States, would cease to be so in fact, because its entrance would be situated in the territorial waters of one of them. This would be a very serious restriction, particularly in case of war, on the rights of the other State, and would conflict with the legal principle that when a right is recognised all action essential for the exercise of that right is in consequence also recognised.

The bar is common property; consequently the course followed by vessels entering and leaving should also be common property.

This is to the advantage of both States, for there is no doubt—indeed, it is a well-known fact—that the line of the *exterior thalweg* may, and sometimes does, shift in course of time, so that either of the two contiguous States might suffer if my solution were not adopted.

I would accordingly add to Article 2 (*c*) proposed by me above the following clause:

> "*When the frontier between two contiguous States is formed by a river which touches both of them and is common to both where it reaches the coast, the line of demarcation between the territorial waters of the two States is formed by the line of the* exterior thalweg *of the river as far as it can be traced, and thereafter by a line perpendicular to the coast as far as the outer limit of the territorial waters.*"

### *V. Bays*

As regards bays, I accept Article 4 of the draft, but I think that the latter part of the first paragraph should be amplified to cover cases in which, even in the absence of continuous and immemorial usage, recognition might be given to the absolute necessity for the State concerned to secure its defence and its neutrality and to maintain navigation and maritime police services.

This clause, which is in harmony with the theory which DRAGO, developing and further defining the ideas of Edmund RANDOLPH [1] expounded in his note on Arbitration in connection with the Newfoundland Question in 1910,[2] and

[1] In the *Grange* case (Delaware Bay), 1793.

[2] "Une certaine catégorie de baies, qui peuvent être appelées les baies historiques, forment une classe distincte et à part et sans aucun doute appartiennent au pays riverain, quelles que soient la profondeur de pénétration et la largeur de leur ouverture, quand ce pays a affirmé

also with the views of other authors,[1] contains its own justification.

To regard as being part of the high seas narrow areas of sea within the limits of territorial waters, and running inland following the broken line of the coast, would involve great difficulties and risks both for the State itself and for the community of nations, owing to the disputes to which such a situation might give rise.

It may even be said that national feeling and the most legitimate interests of the State affected (*e.g.*, Norway) would be deeply wounded.

This disposition is to be found in Article 7 of the draft submitted by Captain STORNY to the Buenos Aires Conference of the International Law Association in 1922, in the following terms:

> "L'Etat pourra comprendre dans les limites de sa mer territoriale les estuaries, golfes, baies ou parties de la mer adjacente où un usage continu et séculaire aura consacré sa juridiction ou qui, dans le cas où ces précédents n'existeraient pas, seraient d'une nécessité inéluctable, selon le concept de l'article 2" (in order to secure defence and neutrality and to maintain navigation and maritime police services of all kinds).

In justification of this article, the distinguished author of the draft says:

> "Nous considérons cet article comme étant de la plus grande importance; il affirme sous une forme plus concluante la partie finale de l'article 3 du Projet de Définition et Régime de la Mer territoriale, de l'Institut de Droit international. Il contient aussi, évidemment, en synthèse, la doctrine des 'baies historiques', selon la manière dont cet ancien principe fut formulé par le docteur Drago.
>
> "La clause finale de l'article s'explique parfaitement pour les nations nouvelles (américaines, par exemple), dont beaucoup parmi elles possèdent des côtes étendues, encore peu peuplées, et chez lesquelles on ne peut présenter les antécédents d'un domaine séculaire comme chez les nations qui comptent mille années d'existence ou davantage."

*I therefore propose to add at the end of paragraph* 1 *of Article* 4:

> "*. . . or if recognition is given to the absolute necessity for the State affected to secure its defence and its neutrality and to maintain navigation and maritime police services.*"

### *VI. Islands*

I agree with Article 5 of the draft, but I would observe that it does not cover the case of archipelagoes of which all the component islands are separated from the mainland by more than twice the width of the territorial sea

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sa souveraineté sur elles et que des circonstances particulières, telles que la configuration géographique, l'usage immémorial et par-dessus tout les nécessités de la défense justifient une telle prétention."—*Revue de Droit international public*, Vol. XIX, p. 482.

[1] Emer DE VATEL, M. DE MARTENS, etc.

—unless it was the Rapporteur's idea to apply the same provision to them, which would mean that each of the islands in an archipelago would have its own territorial sea.

If this is meant, it should be made clear in the draft in order to remove all doubt; for it is well known that at least one other solution has been proposed, namely, to regard the islands forming an archipelago as a single unit, and to reckon the limit of the territorial sea from the islands farthest from the centre of the archipelago (ALVAREZ draft, submitted at the Stockholm Conference of the International Law Association in 1924, and draft submitted by the American Institute of International Law to the Governing Council of the Pan-American Union, March 2nd, 1925).

In my opinion, however, this latter solution is preferable, for it takes more account than the former of the necessity for securing the defence and neutrality of the State concerned and maintaining navigation and maritime police services, and at the same time it seems to me more in conformity with international usages.

It seems obvious that the existence of narrow strips of non-territorial water between islands in one and the same archipelago may give rise to serious difficulties, which it would be preferable to avoid.

*I therefore propose that the following clause be added to Article* 5:

> *"In the case of archipelagoes the component islands are considered as forming a whole, and the width of the territorial sea shall be measured from the islands most distant from the centre of the archipelago."*

### *VII. Regulations*

To conclude these observations—which for lack of time I can neither develop as I should have wished and as the complexity and importance of the subjects demand, nor extend to other points in the report and draft—I propose to consider Article 10.

Is the list of purposes for which a coastal State can exercise its right of legislation and administration given simply *exempli gratia*, or is it intended to be limitative?

The second paragraph of the article: "The riparian State shall have the right to extend its legislative and administrative action to other domains when interests deserving of its protection in territorial waters are affected"—appears to show that the list merely consists of examples, but that the action of the coastal State for other purposes not included in the list is contingent upon their being deserving of its protection.

But who is to be judge of that? The International Waters Office? No, for no such powers are conferred upon it by Article 3 or Article 10 or any other article. The other States? But if so, how and by what procedure? That would involve a prolongation of the system of arbitrary judgment and of the uncertainties, disputes and conflicts the removal of which is the whole

object of the draft. The State itself? But in that case it seems to me neither necessary nor expedient to lay down a restriction which is not really a restriction at all, and which, if it were, would conflict with the coastal State's right of dominion over the territorial sea, as recognised in Article 1.

*I therefore propose that Article* 10 *be drafted in general terms, perhaps as follows:*

> "*Within its territorial waters the riparian State shall have the power of legislation and administration in every field of social activity, subject to the restrictions embodied in the present Convention, and may employ the necessary means of constraint to enforce,*" etc. (the rest as in the proposed article).

In conclusion, I must express my high appreciation of the report of our colleague Professor SCHÜCKING, which has once more illustrated his immense learning, profound intellect and high judicial spirit.

While the excellence of the report resides in the methodical manner in which it is composed and in the vast quantity of material which it furnishes for the study and discussion of such a difficult and delicate question as that of territorial waters, the accompanying draft is remarkable from the technical juridical point of view.

Lisbon, January 10th, 1926.

(*Signed*) Barbosa DE MAGALHAES.

### III. OBSERVATIONS BY MR. WICKERSHAM

The report of M. Schücking, the distinguished Rapporteur, upon Question (*b*) submitted by the main Committee to the Sub-Committee composed of M. Schücking, M. de Magalhaes and Mr. Wickersham, reached the last named only a few days before he left New York and he, therefore, was unable to prepare his observations on the same before coming to Geneva. On his arrival he completed his study of the report, and a conference with the distinguished Rapporteur concerning it led the latter to accept a number of modifications suggested by Mr. Wickersham—modifications which are indicated in the revised recommendations attached to the report.[1] Later, the observations and suggestions of M. de Magalhaes were received and discussed, and with respect to them the undersigned desires to record certain observations.

#### I

M. de Magalhaes' observations on the nature of the jurisdiction of the littoral State over the territorial sea had already been considered by the Rapporteur and Mr. Wickersham and the former had accepted the formula

[1] See p. 144.

adopted by the Institut de Droit international instead of that contained in his original report.

II

Concerning the extent of the territorial sea, M. de Magalhaes objected to the limit of three miles embodied in M. Schücking's revised suggestions and he further objected to M. Schücking's recommendation of two zones. He desires the adoption of a single zone of sufficient width to permit the exercise of all the rights in the adjacent waters enjoyed by a littoral State. The undersigned objects to these suggestions for the following reasons:

1. The so-called territorial waters are as much a part of the realm of the littoral State as is its land—subject only to certain rights and usages on the part of vessels of other States which have become a part of the law of nations. Such, for example, is the right of innocent passage of such vessels through these waters, without subjecting themselves to the jurisdiction and laws of the littoral State save for exceptional purposes. Within this belt of water the sovereignty of the littoral State may be fully exercised and any restriction upon it or exception to it must be clearly established by a State claiming the same.

2. But a littoral State frequently may, and in practice often does, for certain particular purposes, exercise a certain jurisdiction beyond the limit of its territorial waters. The right to this jurisdiction depends upon: (a) *recognised usage* or (b) *international convention.*

(a) *By long-continued usage, acquiesced in by other nations.*

Examples of this are furnished through the exercise by the United States of America of the right of visitation of foreign vessels coming to one of her ports, for the enforcement of her revenue, sanitary or pilotage laws, within a distance of four marine leagues from her coast. The right to exercise this power was first asserted by Act of Congress of March 7th, 1799, authorising revenue officers to board incoming vessels "within four leagues of the coast" and examine ships' papers, etc., and punish the master and the ship for unloading or transshipping cargo within that distance. This provision has been embodied in statutes subsequently enacted (U. S. Rev. Stats., Sections 2760–5, 2814–5, 2867–8, 3067).

The exercise of this right and acquiescence in it by other nations, as OPPENHEIM says, establishes a rule of international law (see I. MOORE'S Digest, 731; I. OPPENHEIM, 340).

Great Britain also by similar Acts (since repealed) authorised similar visitation within four leagues of the coast (*cf.* George II, c. 35) and at a later date, within a distance of eight leagues of her coast (16 and 17 Vict., c. 107; 39 and 40 Vict., c. 363).

These rights depend upon the broad principle of national defence—a principle which led Great Britain to declare, in the British Territorial

Waters Jurisdiction Act (41 and 42 Vict., 579 of 1878), that "the rightful jurisdiction of Her Majesty extends to such distance as is necessary for the defence and security of such dominions." This broad declaration is, so far as the undersigned has been able to discover, supported by no modern authority and is no longer maintained by the Government of Great Britain.

The right to pursue a vessel which has committed an offence in territorial waters against the laws of the littoral State, provided the pursuit begins in such waters and continues until it is interrupted by capture, or by the pursued vessel entering its own territorial waters or those of a third State—a right well recognised in the law of nations—is another example of the exercise of certain rights in the high seas beyond the territorial sea. This is known as the doctrine of "hot pursuit."

(b) *By international convention.*

In many instances such rights arise out of treaties between two or more States. Such are the rights of pursuit and visitation of vessels suspected of violating or endeavouring to violate the laws of the United States against the importation of intoxicating liquors, embodied in the ten or more treaties recently entered into between the United States and other States to be hereinafter referred to.

The right of visitation, etc., conferred by these treaties it is agreed may be exercised outside the limits of the territorial waters and within a distance from the coast of the United States which may be traversed in one hour by the vessel suspected of the offence. With the high speed of modern vessels, this distance might well be thirty or forty miles.

The foregoing observations are directed to show the impracticability of endeavouring to embrace in a single zone of the waters adjacent to the shores of a State all the rights over vessels in such waters which, by the right of sovereignty, custom or convention, that State may exercise.

III

As to the width of the territorial sea, so-called, M. Schücking's report demonstrates the lack of agreement among States, some claiming one distance, some another.

But, after a long history of doubt, uncertainty and conflicting contentions on the subject, certain treaties recently have been entered into which, so far as the leading maritime Powers of the world are concerned, adopt finally as a rule a width of three miles.

Such are the liquor treaties between the United States and:

Great Britain, dated January 23rd, 1924;
Germany, dated May 19th, 1924; and
The Netherlands, dated August 1st, 1924;

in each of which is contained the following clause:

"The High Contracting Parties declare that it is their firm intention

to uphold the principle that three marine miles, extending from the coastline outwards, and measured from low-water mark, constitute the proper limits of territorial waters."

Similar treaties made between the United States and:

Italy, dated June 3rd, 1924;
Norway, dated May 24th, 1924;
Sweden, dated May 22nd, 1924;
Denmark, dated May 29th, 1924;

contain the following provision:

"The High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction."

But all of these treaties agree to the exercise by the United States of the same right to pursue, visit, etc., vessels of the nationality of the other Contracting Party outside the limits of the territorial waters and within such distance from the coast of the United States as may be traversed in one hour by the vessel suspected of endeavouring to commit the offence.

In view of the so recent declaration by the United States, Great Britain, Germany and the Netherlands of their "firm intention" to adhere to three miles from the coast as the limit of the territorial sea, the undersigned feels that it is highly inexpedient to suggest to the various States the adoption of a six-mile limit, as suggested by M. de Magalhaes, and in this M. Schücking has agreed and has modified his report accordingly.

## IV

But the treaties recently entered into by various nations with the United States, as above stated, all agree to the exercise by that country of the right of visitation, capture, pursuit, etc., "outside the limit of territorial waters," to an extent measured, not by miles, but by the speed of the foreign vessel.

Under the so-called "Hovering Acts" of the United States, above referred to, the right of visitation, seizure, etc., is exercised within a distance of *four* marine leagues from the coast.

It has been held that, under the laws of Italy, salvage services rendered by a French to a German ship within five miles of the Italian coast are governed by the law of Italy.[1]

As to pilotage and towage: the Acts of Congress of the United States authorise officers of the Department of Commerce to board any vessel *within four leagues* of the coast of the United States to enforce its navigation laws. An Act of Great Britain (5 Geo. IV, c. 73) required foreign inbound vessels for Liverpool to take pilot at Pt. Lynes—much more than three miles from the coast.[2]

[1] *The Extent of the Marginal Sea*, Henry G. Crocker, p. 598.
[2] Lushington, p. 295.

Respecting fisheries: there are still more varied claims and exercises of right.

The Argentine in 1907 claimed rights up to ten and a half miles from her coast.[1]

In point of fact, no fewer than *four* of the maritime States of Europe reject the three-mile limit for fishing protection, while a *fifth* has deviated in part from it.[2]

The inadequacy of the territorial waters jurisdiction for the protection of fisheries is shown by FULTON in Chapter V. Many treaties have been made to remedy this. Obviously the matter can only be adequately dealt with by special agreement. No delimitation of the territorial waters to a limit of three, six or even twelve miles would meet all of these requirements.

OPPENHEIM says:

> "Not to be confounded with the territorial maritime belt is the zone of the open sea over which a littoral State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound for one of their ports as are approaching, but not yet within, their territorial maritime belt. Twiss and Phillimore agree in stating that in strict law these municipal laws have no basis, since every State is by the law of nations prevented from extending its jurisdiction over the open sea, and that it is only the comity of nations which admits tacitly the operation of such municipal laws as long as foreign States do not object, and provided that no measure is taken within the maritime belt of another nation. . . . But I believe that, since municipal laws of the above kind have been in existence for more than a hundred years, and have not been opposed by other States, *a customary rule of the law of nations may be said to exist* which allows littoral States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound for their ports as are approaching, although not yet within, their territorial maritime belt."[3]

In the course of his argument before the Behring Sea Arbitral Tribunal in 1893, Sir Charles RUSSELL, afterwards Lord Chief Justice of England, said:

> "Take the case of the revenue laws—the Hovering Acts—upon what principle do those Acts rest? Upon the principle that no civilised State will encourage offences against the laws of another State the justice of which laws it recognises. It willingly allows a foreign State to take reasonable measures of prevention within a moderate distance even

[1] *The Sovereignty of the Sea*, Thomas W. FULTON, p. 661.
[2] *Ibid.*, p. 664.
[3] OPPENHEIM, International Law, Vol. I, p. 340.

outside territorial waters; but all these offences, and all offences of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offence against the municipal law within the area to which the municipal law properly extends."

J. LUSHINGTON said, in the case of the *Annapolis:*[1]

> "In revenue, quarantine and pilotage matters, the necessity of the case seems to require a more extended jurisdiction than the three-mile limit."

The exercise by States beyond the limit of their territorial waters of rights of the character above described can only be sustained by proof of recognised custom or of international convention; whereas within the territorial waters the plenary jurisdiction of the littoral State is presumed and any limitation of that right by custom or treaty must be established. For these reasons, the undersigned is opposed to the adoption of a single zone of territorial waters, extended beyond the three-mile limit, as recommended by M. de Magalhaes.

V

The distinguished Rapporteur, M. Schücking, while concurring in these views, has included a provision in his proposed Article 2 to which the undersigned cannot agree. This article states that outside the territorial waters States may exercise "administrative rights" depending on usage or international convention, and that included in these are such rights as are necessary to their protection.

This clause goes far beyond anything which is commonly agreed to by States. In the first place, rights of the kind above described, which by long-established usage or convention a State may exercise beyond the limit of its territorial waters, can hardly be included in the description "administration". Secondly, while it may be true, as before remarked, that these rights are founded upon the broad principle of the defence of national interests, it cannot be conceded that a State, independently of long-established and accepted custom or treaty, has the right to exercise any power it may see fit beyond its territorial sea upon the ground that it is necessary to its protection.

VI

Concerning the lateral limits of the territorial waters, it should be observed that, where the boundary lines of the States run over the land, these lines are described in treaties or other documents. If these lines by the treaty description terminate at the shore-line, they naturally would be prolonged across the width of the territorial sea.

[1] LUSHINGTON, 295. See also KENT, *Commentaries on International Law* (Abdy edition), 1878, pp. 103–104.

Where the boundary line between States is a stream which empties into the sea, generally such a stream opens out into a bay before it reaches the sea, and the rule of division applicable to bays there applies. If it does not, the boundary line between the States is drawn down the middle of the navigable channel (LAWRENCE, p. 140; CROCKER, p. 279). Sometimes the river mouth becomes a strait. If the strait be more than six miles in width and the land on either side is owned by a different State, the general rule is that the boundary line runs through the middle of the stream. If, on the other hand, the stream be less than six miles in width, the principle of *thalweg* would ordinarily apply, although the rule is not uniform (see HALL, pp. 195–6; LAWRENCE, 140; CROCKER, 281). If the shores of a strait on both sides are owned by one nation but the strait connects waters the opposite banks of which are owned by different Powers, the strait constitutes a maritime highway which may not be closed by the proprietor State (RAYNEVAL, *Institutions du Droit de la Nature*, I, p. 298), *e.g.*, the Baltic, the Dardanelles. As to the embouchures of a river, their banks seldom run parallel to the end, cutting a right angle to the coast. Usually a river spreads at its mouth into a bay or delta in which sometimes there is one, sometimes several, navigable channels into the sea. As to bays, the rule is well settled that the width of the territorial sea is measured seaward from a straight line drawn across the bay in the part nearest the entrance at the first point where the width does not exceed twelve marine miles (Convention of October 20th, 1818, between Great Britain and the United States: FULTON, pp. 628–9, Rules, Institute Int. Law., Article 3).

There appears to be an absence of authority for the principle of *thalweg extérieur* invoked by M. de Magalhaes.

## VII

As to bays: the case of the *Grange* involved the assertion of the jurisdiction of the United States over the Delaware Bay in a question of violation of neutrality. This was largely based upon historical grounds—besides the fact that the United States owned both sides of the bay and the adjacent coast (CROCKER, pp. 632–6). The same considerations were asserted respecting Chesapeake Bay in the case of the *Alleganean* (Moore, Sub-Arts. V. 4, p. 4332; CROCKER, p. 667). In that case the court used the following language:

> "The configuration of Chesapeake Bay, the fact that its headlands are well marked and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States wholly encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another . . ."

Therefore the United States had plenary sovereignty over the bay.

In my opinion, the clause which M. de Magalhaes suggests, added to the first paragraph of M. Schücking's Article 4, would make general a rule which finds support only in special cases and would meet with great opposition.

Subject to the foregoing observations, the undersigned concurs in the revised recommendations suggested by M. Schücking without the modifications recommended by M. de Magalhaes.

Geneva, January 28th, 1926.

(*Signed*) George W. WICKERSHAM.

### IV. DRAFT CONVENTION AMENDED BY M. SCHÜCKING IN CONSEQUENCE OF THE DISCUSSION IN THE COMMITTEE OF EXPERTS

[*Translation.*]

#### ARTICLE 1

*The character and extent of the rights of the riparian State.*

The State possesses sovereign rights over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such sovereign rights.

Such sovereign rights shall include rights over the air above the said sea and the soil and subsoil beneath it.

#### ARTICLE 2

*Extent of the rights of the riparian State.*

The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or of vital necessity. There are included the rights of jurisdiction necessary for their protection. Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised.

Exclusive rights to fisheries continue to be governed by existing practice and conventions.

#### ARTICLE 3

*International Waters Office.*

(Suppressed.)

#### ARTICLE 4

*Bays.*

In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea where the distance between the two shores of the bay

is ten marine miles, unless a greater distance has been established by continuous and immemorial usage. The waters of such bays are to be assimilated to internal waters.

In the case of bays which are bordered by the territory of two or more States, the territorial sea shall follow the sinuosities of the coast.

ARTICLE 5

*Islands.*

If there are natural islands, not continuously submerged, situated off a coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself.

In the case of archipelagoes, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the centre of the archipelago.

ARTICLE 6

*Straits.*

The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds ten miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding ten miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line.

ARTICLE 7

*Pacific passage.*

All vessels without distinction shall have the right of pacific passage through the territorial sea. In the case of submarine vessels, this right shall be subject to the condition of passage on the surface. The right of passage includes the right of sojourn in so far as the latter may be necessary for navigation. For the sojourn of warships, see Article 12.

The right of free passage includes the right of passage for persons and goods independently of the right of access to the foreign mainland.

ARTICLE 8

*Coasting trade.*

(Suppressed.)

ARTICLE 9

*Jurisdiction.*

Vessels of foreign nationalities passing through territorial waters shall not thereby become subject to the civil jurisdiction of the riparian State.

Further, crimes and offences committed on board a foreign vessel passing through territorial waters by persons on board such vessels against persons or things also on board shall, as such, be exempt from the jurisdiction of the riparian State.

Offences, the consequences of which are not confined to the vessel or the persons belonging to it, are subject to the criminal jurisdiction of the riparian State, in so far as they constitute offences against its established law and its tribunals have competence to deal with them. As offences the consequences of which are not confined to the vessel or the persons belonging to it shall be considered all offences which disturb the peace or public order in the territorial sea.

ARTICLE 10

*Regulations.*

Within its territorial waters, the riparian State shall have full powers of legislation and administration in all domains of public activity, subject to the restrictions imposed by the present Convention, and may employ all measures of constraint necessary to ensure respect for its jurisdiction so as to permit it to deal with offences.

The riparian State shall have the right to continue on the high seas the pursuit of a vessel commenced within its territorial waters and to arrest and bring before its Courts a vessel which has committed an offence within its territorial waters. If, however, the vessel is captured on the high seas, the State whose flag it flies shall be notified immediately. The pursuit shall be interrupted as soon as the vessel enters the territorial waters of its own country or of a third Power. The right of pursuit is extinguished as soon as the vessel has entered a port of its own country or of a third Power.

Within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration. Such dues or charges shall be levied under conditions of equality. Ships which have only entered territorial waters under pressure of *force majeure*, or because they are in distress, shall be exempt from such dues and charges.

ARTICLE 11

*Riches of the sea, the bottom and the subsoil.*

In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil.

As regards fishery rights, reference is made to Article 2, paragraph 2.

ARTICLE 12

*Warships.*

The exercise by warships of the right of free passage may be subjected by the riparian State to special regulations. Foreign warships when admitted

to territorial waters must observe the local laws and regulations, particularly those relating to navigation, anchoring and health control. If a serious and continued offence is committed, the commander of the vessel shall receive a semi-official warning in courteous terms and, if this is without effect, he may be requested, and, if necessary, compelled, to put to sea. The same dispositions shall apply if the local authorities consider that the presence of the vessel threatens the safety of the State. Except in cases of extreme urgency, however, these stringent measures shall only be taken upon the instructions of the central Government of the country.

In the case of minor offences, the diplomatic channel shall be used.

### Article 13

*Jurisdiction over foreign merchant vessels in maritime ports.*

In maritime ports, foreign merchant vessels shall be subject without restriction to the civil and non-contentious jurisdiction of the riparian State.

The criminal jurisdiction of the riparian State shall be restricted to the punishment of offences committed on board which are not directed against a member of the crew or against passengers and their property. Its criminal jurisdiction shall further be restricted to cases in which the captain of the vessel has asked the port authorities for assistance and cases in which the peace or public order in the port has been disturbed.

### Article 14

*Settlement of disputes.*

(Suppressed.)

### Notes on the Amended Draft Convention

[*Translation.*]

*As regards Articles* 1 *and* 2.

The use of the phrase "the State shall have an *unlimited right* of dominion" in the original text is due to a mistake in translation. The text should read "the State possesses sovereign rights." The article deals with the character and extent of the rights of the riparian State. The choice has to be made between two methods. The first method takes as its basis the idea of a dominion of the riparian State over the territorial sea, such dominion having to be restricted by the existence in favour of other States of certain rights of common enjoyment. The other theory maintains that the sea is free and recognises to the riparian State only certain restricted rights within the domain of the so-called territorial sea. Careful examination of the problem shows that the solution given to this question of principle is not a matter of indifference from the practical point of view. If the riparian State is admitted to possess a right of dominion, one must admit that it has the legal right to extend its dominion in new directions. My colleague on the Sub-Committee, Mr. Wickersham, proposed the expression "the State possesses

sovereign rights." M. de Magalhaes, on the other hand, preferred the following definition: "the State has a right of dominion." This difference appears to be rather one of form than one of substance.

Having regard to the present state of the law, fixed limits for the territorial sea can only be found if certain preliminary assumptions are accepted:

1. The necessity of excluding fishery rights. After discussion with Mr. Wickersham, I convinced myself that exclusive rights of fishing as governed by existing practice and conventions ought to be reserved for subsequent special treatment. The notes contained in M. de Magalhaes' observations confirmed me in this view. My colleague has shown the close connection which exists between the geographical condition of the littoral waters and the extension of the fisheries. It is for this reason that a general uniform regulation of all fishery rights could not be applied to territorial waters. Clearly also it would be necessary to preserve all those rights which are essential for the conservation of fishery rights, for example the right to police fisheries. Undoubtedly such a solution is open to criticism, since one simultaneously lays down fixed boundaries and maintains rights outside such boundaries, but the difficulties which arise appear incapable of any other solution.

2. States are in the habit of asserting special rights outside any fixed boundaries to meet various needs which arise unexpectedly. One could, therefore, hardly hope that they would be satisfied with boundaries laid down once and for all. It would even be impossible to secure recognition for such boundaries by taking as the basis for the general sphere of dominion the furthest limit up to which to-day any State exercises some particular right. Hence follows the necessity of allowing two zones, one fixed and the other constituting a zone within which would be recognised only such rights of the riparian State as have hitherto been exercised therein for purely administrative ends. The second boundary proposed in the report would not be laid down once and for all on the side of the high sea; on the contrary it should be elastic so as to take account of possible essential requirements of States. Furthermore, to escape the danger of a tendency of States to establish for themselves a second zone analogous in legal character to the first zone, riparian States ought in such second zone to be limited to the exercise of definite rights, namely, rights of an administrative character. As Mr. Wickersham pointed out to me, however, such administrative rights ought only to be named in the Convention by way of examples, and there should be a general clause in the Convention giving the fullest possibility for the recognition of administrative rights. By permitting no more than the exercise of administrative rights within the second zone, one would exclude rights of economic enjoyment, excepting always fishery rights which are in no way dealt with in the draft. I thought that I was offering a guarantee against arbitrary claims to exercise rights in the second zone by proposing the establishment of an International Waters Office. The members of the Sub-

Committee, however, regarded this proposal as a mere suggestion and elaborate discussion of it will not be required.

If the principles indicated above are accepted, namely, the establishment of two zones and the exclusion of fishery rights, we may return to the question of the boundaries to be fixed for the first zone. Even then this question presents some difficulty. Since the treaties recently concluded between the large States, particularly the United States and Great Britain, contain an express acceptance of the limit of three marine miles, I feel obliged to abandon my first proposal of a limit of six miles and return to the three-mile limit. If, notwithstanding the creation of a second zone and the exclusion of fishery rights, those States which hitherto have exercised rights outside the three-mile limit, do not accept that limit, it will still be possible to conclude a Convention on the basis of the three-mile limit, States possessing historical rights over a more extensive zone being permitted to make a reservation on the subject.

*As regards Article* 3.

After discussion with various members of the Committee, I convinced myself that the moment had not yet come to propose the establishment of an International Waters Office. My colleagues on the Sub-Committee felt, however, that this proposal might be taken into account as a simple suggestion.

*As regards Article* 4.—*Bays.*

My original draft contemplated a distance of twelve marine miles between the two sides of a bay, the width of the territorial sea being fixed at six miles. If a width of three miles is taken for the latter, a distance of ten miles may be accepted as regards bays and is justified by the history of the question (for details, see my report, page 82 of the present document). The third paragraph of the original text of the article must be struck out, being closely connected with the establishment of the International Waters Office. For the same reason it is no longer possible to take account of M. de Magalhaes' observations in favour of recognising in the future to the State concerned a right to assure its defence and neutrality, its navigation services and its marine police. In my colleagues' view, the question would be one of admitting new bays which would be assimilated to internal bays. I should have no objection if the International Waters Office were to be created, but without such an office the right asked for by M. de Magalhaes would be, to some extent, dangerous.

*As regards Article* 9.

The restrictions on jurisdiction here proposed could be the more easily included in a general convention if effect were given to a suggestion made by Mr. Wickersham in the Sub-Committee by which the following provision would be added to paragraph 3:

"As offences the consequences of which are not confined to the vessel or the persons belonging to it shall be considered all offences which disturb the peace or public order in the territorial sea."

(*Signed*) SCHÜCKING.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 3

*adopted by the Committee at its Second Session, held in January 1926*

# DIPLOMATIC PRIVILEGES AND IMMUNITIES

The Committee is acting under the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include the question of diplomatic privileges and immunities in its list.

The Committee reached this decision on the basis of a report submitted to it by a Sub-Committee consisting of M. Diena and M. Mastny. It is, of course, understood that the Committee has not at the present stage felt itself called upon to pronounce either for or against all the various concrete proposals made in this report.

The particular questions falling within the general subject of diplomatic privileges and immunities which the Committee considers might advantageously be dealt with in a general convention are set out below.

The Committee has the honour to request the various Governments to inform it whether they agree with the Committee that these questions, or some of them, could advantageously be considered at the present moment with the view to the conclusion of a general convention, which, if necessary, could be completed by particular agreements between groups or pairs of States. According to its terms of reference, the Committee will report on the various points to the Council of the League after it has been able to consider the replies of the Governments.

It is expressly understood that the basis to be adopted in examining and answering the various questions raised herein should be the material considerations which make the existence of diplomatic privileges and immunities

[1] See Assembly Resolution of September 22nd, 1924.

useful and desirable. The Committee does not consider that the conception of ex-territoriality, whether regarded as a fiction or given a literal interpretation, furnishes a satisfactory basis for practical conclusions. In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions.

### A. Privileges and Immunities of Diplomats in the Traditional Sense of the Term and of Persons belonging to a Legation

#### I. *Extent of these Privileges and Immunities considered under the following Heads*

1. Inviolability attaching to:
   - (*a*) The persons themselves;
   - (*b*) The official premises of the legation, including the archives;
   - (*c*) The private residence of the persons in question;
   - (*d*) Correspondence;
   - (*e*) Goods serving for the personal use of the diplomat.

2. Immunity from civil, administrative or fiscal jurisdiction, with all the limitations and exceptions consistent with the object of the immunity.

3. Immunity from criminal jurisdiction.

4. Fiscal immunities (including Customs).

*Note* 1.—The above are merely heads for discussion. It is not suggested that every question falling under them should necessarily be regulated by a general convention. This reservation applies in particular to the question of fiscal immunities, in regard to which it may be desirable to leave details to be the subject of bilateral agreements but may at the same time be possible, as well as desirable, to lay down some general principles by way of a plurilateral or universal convention.

*Note* 2.—Under the head of inviolability should be discussed the question of the existence and, in the affirmative, of the extent of the right to afford asylum to persons threatened with criminal proceedings.

*Note* 3.—In connection with immunity, it would seem desirable to consider whether and to what extent immunity involves exemption from the operation of social legislation and, in particular, legislation concerning social insurance.

*Note* 4.—In connection with immunity from jurisdiction, it would be desirable to consider what should be the position of the privileged person as regards giving evidence before the courts.

#### II. *Persons entitled to Privileges and Immunities*

It seems not to be disputed that among such persons must be included the chiefs of embassies and legations and the official staff employed exclusively in

diplomatic work, and that the privileges and immunities extend to members of the families of such persons living with them. But there are other questions connected with this head which should be examined and settled:

1. First, the question arises whether, in order to avoid abuses or uncertainty, it should be a condition of possessing privileges that the persons in question should be included in a list delivered to the Foreign Office of the country concerned. In close connection with this point is the question whether and on what grounds (for example, on the ground of the palpably exaggerated number of officials included in the list) the Government would be entitled to refuse or to accept the list with or without modification.

2. To what extent may official agents of a foreign State who are not employed in diplomatic work in the proper sense of the term acquire diplomatic privileges and immunities by being included among the personnel of the legation? Under this head falls the case of particular categories of attachés, such as certain commercial attachés, attachés for social questions and others.

3. What is the position of the servants of a diplomatic agent and of the servants of a legation, *i.e.*, its clerks, domestic staff and other employees?

4. In what cases and to what extent may diplomatic privileges and immunities be refused to a person, who would otherwise be granted them: (*a*) when he is a national of the country concerned; or (*b*) when, being already domiciled in the country, he occupies a special position intermediate between foreigners and nationals?

5. In regard to some of the above-mentioned categories, it will be necessary to examine the limits of the privileges (if any) which should be enjoyed.

III. *Duration of Diplomatic Privileges and Immunities as regards:* (1) *The Privileged Person;* (2) *Premises and Archives*

*Note* 1.—Under the above point (2), it is intended to raise the question of the treatment to be accorded to privileged premises and archives which have ceased to be occupied or to be in the charge of a diplomatic agent; as may, for example, happen in the case of the decease of a diplomatic agent or when a State ceases to recognise and to receive representatives from the Government of a State which has established a legation in its territory and the legation premises and archives are left without any person entitled to take charge and be responsible for them.

*Note* 2.—In the case of the decease of the diplomatic agent, a similar question may arise as to the members of his family and his servants.

IV. *Position of a Diplomatic Agent within and, more particularly, in Transit through, the Territory of a State to which he is not Accredited*

B. In what Sense and to what Extent are Diplomatic Privileges and Immunities enjoyable by Persons other than those dealt with under "A" above?

Under this head it would be proposed to discuss, taking so far as necessary the same subdivisions as under "A", the position of:

(*a*) Representatives of the Members of the League and officials of the League when engaged on the business of the League;

(*b*) The Judges and staff of the Permanent Court of International Justice;

(*c*) Permanent representatives specially attached to the League of Nations by various States;

(*d*) Members of international bureaux and commissions not invested by treaty with diplomatic privileges and immunities.

*Note.*—In the opinion of the Committee, it is not certain that an absolute identity of privileges and immunities should be established between diplomats proper and the categories just mentioned. It seems possible that the difference of circumstances ought to lead to some difference in the measures to be adopted.

* * *

The Committee will be grateful to receive suggestions from Governments as to any topics omitted above which are thought to be suitable for consideration with a view to the conclusion of a general international agreement.

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. Hammarskjöld,
*Chairman of the Committee of Experts.*
Van Hamel,
*Director of the Legal Section of the Secretariat.*

Annex

## REPORT OF THE SUB-COMMITTEE

M. Diena, *Rapporteur.*
M. Mastny.

*What are the questions relating to diplomatic privileges and immunities which are suitable for treaty regulation and what provisions might be recommended on this subject?*

## I. REPORT BY M. DIENA

[*Translation.*]

The Committee of Experts for the Progressive Codification of International Law, having decided that this question should be included in its preliminary investigations, adopted the following resolution at its meeting at Geneva on April 8th, 1925:

> "The Committee instructs a Sub-Committee to ascertain what are the questions relating to diplomatic privileges and immunities which are suitable for treaty regulation and what provisions might be recommended on this subject."

Having had the honour to be appointed Rapporteur of the Sub-Committee for Question (*c*), I thought it my duty, after commencing my investigations, to get into touch with His Excellency Dr. Mastny, who is also a member of this Sub-Committee, in order to discuss with him the manner in which I ought to carry out my task.

Dr. Mastny was good enough to reply in a long letter containing numerous remarks and suggestions of the greatest value.

As the first result of this exchange of views, we agreed in recognising that the whole question of diplomatic privileges and immunities was suitable for treaty regulation. There are, in fact, certain fundamental principles concerning this question which are generally admitted and although, as regards certain particular points, there is often considerable divergence between the laws and the legal practice of the various countries, these differences can be overcome by an international agreement arrived at either collectively or as the result of a series of bilateral agreements. Furthermore, if by means of an international agreement it were possible to effect progress in the positive law on this subject, in accordance with the aims of the most distinguished and best qualified students, that would at any rate remove many doubts and divergences which *for the moment* make it impossible to regard the internal regulations observed in the different countries with regard to diplomatic prerogatives as forming an altogether uniform legal system.

As regards the method to be adopted in our work, we agreed in recognising that it was necessary: (1) To determine as exactly as possible the existing law, taking into account international customary law and, where necessary, conventional law, as well as the municipal law created by the legislature and the Courts in the various countries; (2) to ascertain which points or, rather, questions are disputed as regards either legal doctrine or practice; (3) to indicate the solutions of these questions favoured in one or other country, and which of these would be the most reasonable solution; and (4) to indicate possible and desirable alterations and reforms to be introduced into the existing rules—paying due and even critical attention throughout both to the draft prepared on this question by the Institute of International Law at Cambridge in 1895 and to the rules contained in the project for the codifica-

tion of American international law laid down on March 2nd, 1925, by the American Institute of International Law.

The Committee's resolutions would justify the Sub-Committee entrusted with Question (*c*) in preparing a preliminary draft international convention to be submitted to Governments. However, we decided, after serious consideration, that it would be premature at present to formulate definite provisions; such provisions should be reserved for a later stage.

It is certainly preferable to begin by setting out principles both *de jure condito* and *de jure condendo*. Future discussion by the Committee will tell us whether it is possible to do more at the present juncture. Further, we shall receive indications from the nature of the reception which our proposals or suggestions meet with from Governments, particularly as to the possibility of an international agreement.

The first problem to be decided regarding existing positive law may be subdivided into two questions: (1) What are the existing diplomatic prerogatives? (2) To what persons do they apply?

It is expedient to postpone consideration of this last question until we deal with questions 2 and 3 above.

As regards the first point, it should first be mentioned that, according to ancient and familiar doctrine, diplomatic agents should enjoy ex-territorial rights. The Institute of International Law recognises this principle, for its draft contains a chapter several articles of which deal with this very question of the ex-territorial rights of diplomatic agents. The American draft decides the question in exactly the opposite sense, Article 23 mentioning ex-territoriality only to state most explicitly that "the private residence of the agent and that of the legation shall not enjoy the so-called privilege of ex-territoriality."

In my opinion, this latter solution is the one that should be adopted. At the same time it is not necessary to say so explicitly, since there is no need to make a statement concerning a thing that does not exist.

It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of a State *X* are on territory which is foreign from the point of view of the State in question. There are sound practical as well as theoretical reasons for abandoning the term "ex-territoriality," for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible.

Thus, if an individual entered a legation building and committed a crime there, the theory of ex-territoriality would require the local authorities to regard this crime as an offence committed on foreign territory, which would be an obvious error.

Moreover, even the Institute of International Law, after affirming the validity of legal acts officially executed by a diplomatic agent with reference

to his own nationals according to the law of the country which he represents and notwithstanding any provisions to the contrary in the *lex loci*, admits in Article 8 of its draft an exception to this principle, "(1) if the acts concern a person who does not belong to the country which the Minister represents; (2) if they are to be effective in the country where the mission is stationed, and are such that they could not be validly performed outside the country or in any other manner."

These exceptions are perfectly justified, but in themselves they would appear to be destructive of the principle to which they are supposed to be an exception.[1]

I was glad to learn that Dr. Mastny is substantially in agreement with my views on this matter. Nevertheless, in deference to tradition, Dr. Mastny would like to preserve the term ex-territoriality, with a limited meaning, and to continue to speak of "diplomatic ex-territoriality," while recognising that the expression is not to be taken literally.

As we are not concerned in this report with legal doctrine only, I have no objection to keeping the old term if there is a strong desire to do so; but in this case it would be necessary to do what the English so often do in the drafting of their laws, whose practical character we all recognise and appreciate. It is well known that English laws frequently contain a definition which is not of a general character, but whose sole object is to explain the sense in which a certain expression is used in a particular law.

Next, in order to specify the prerogatives of diplomatic agents, it is of course necessary first of all to make mention of the *inviolability* which attaches more particularly to their person, their official and private residence and their correspondence and personal effects for the duration of their official mission in the country to which they are accredited.

As this is a generally recognised rule, there should be no difficulty in concluding an agreement with a view to confirming this principle by means of a treaty clause. Even in this case, however, some doubt may arise as to what exceptions may be allowed to this principle. The American project does not touch upon this point; the Institute of International Law in Article 6 of its draft enumerates the three following exceptions: "Inviolability may not be invoked: (1) in the case of lawful defence on the part of individuals against acts committed by persons who enjoy the privilege; (2) in case of risks run by the said persons, voluntarily or unnecessarily; (3) in case of reprehensible

[1] Article 23 of the American draft, after excluding the so-called privilege of ex-territoriality, adds: "However, legal acts executed in the places mentioned by diplomatic agents in the exercise of their functions shall be subject, as to form, to the legislative provisions of the country which they represent." It may be observed that, if this provision was intended to furnish the draft with a conventional law text, it can be approved, at least in principle, and with certain reservations. But if the provision was intended to proclaim a legal rule arising out of principles of law which are also binding upon the local authorities, quite apart from existing conventions, such a statement would, in my opinion, be without any legal justification at all, particularly as regards the validity of acts of marriage.

acts committed by them, compelling the State to which the Minister is accredited to take defensive or precautionary measures; but, except in cases of extreme necessity, this State must confine itself to making the facts known to the Government of the said Minister, to requesting the punishment or the recall of the guilty official, and, if necessary, to surrounding his house to prevent illegal communications or public expressions of opinion."

It should be noted that these provisions, particularly Nos. 1 and 2, are in accordance with existing international usage. There may, however, be some difference of opinion as to the application of No. 3, particularly as regards the measures which the territorial authorities may take in cases of extreme urgency.

There is some connection between the point dealt with in No. 3 of Article 6 of the Institute draft and the question of the alleged right of individuals pursued for offences against the local law to take refuge in the legation building. If a diplomatic agent gives shelter in the legation building to persons who are regarded by the local authorities as criminals, these authorities will obviously consider the act of the diplomatic agent to be *reprehensible*. They may accordingly take the defensive or precautionary measures referred to in No. 3 of Article 6 in the Institute's draft.

There is no need for us to pronounce upon the question whether, as is affirmed in Article 22 of the American draft, the diplomatic agent is obliged to surrender to the local authority any individual pursued by that authority for crime or misdemeanour, or whether he may continue to protect him and, if necessary, help him to escape. All that is not connected, at any rate directly, with diplomatic prerogatives.

As regards immunity from taxation, it must be admitted that these privileges are not suitable for any detailed regulation which could be adopted in the form of a collective treaty. These privileges, which are not strictly necessary for the exercise of diplomatic functions, and which are granted to members of foreign missions simply for reasons of international courtesy, vary greatly in the different countries. Accordingly, it is only possible for States to conclude detailed agreements in this matter by means of bilateral conventions based on reciprocity. At the same time, it is not necessary to exclude the possibility of a collective agreement, but this should constitute the minimum; *i.e.*, it might be possible to obtain agreement to the adoption of certain universally accepted rules. We might take as the basis of this agreement Articles 9 and 11 of the regulations of the Institute of International Law, the former of which says: "The Minister's residence is exempt from military quarterings and from the taxes which are substituted therefor"; while Article 11 stipulates: "A public Minister abroad, the functionaries officially connected with his mission and the members of their families living with them shall be exempt from paying: (1) direct personal taxes and sumptuary taxes; (2) general taxes on wealth, either on the principal or on the income; (3) war-taxes; (4) Customs duties on articles for their personal use.

Each Government shall have the right to indicate what proofs are required in order to secure these exemptions from taxes."

We may also take into consideration Article 24 [1] of the American draft, the wording of which, however, is not so satisfactory as that of the Institute regulation given above.

* * *

The most difficult point in the matter under consideration is that relating to immunity from jurisdiction. In criminal cases this immunity is now absolute, according to generally recognised custom, during the exercise of diplomatic functions (the question of the persons to whom this immunity applies is one which we shall discuss later).

It should therefore be quite easy to affirm this principle in a convention (except as regards the measures which the territorial Power may take in defence of its security), a point upon which some doubt may arise when it is necessary to determine the details and the limits of these measures. Article 13 of the Institute's draft adds: "With regard to crimes, the persons mentioned in the preceding article shall remain subject to their national criminal law, as if the crimes had been committed in their own country."

The idea underlying this article may be approved, but the wording is far from satisfactory. It would have been better to say that these persons remain subject to their national *jurisdiction*. In any case, the words "as if the crimes had been committed in their own country" should have been omitted. If the State to which they belong preferred to treat acts constituting an infringement of the national criminal laws committed by officials in the diplomatic service, during the exercise of their functions in a foreign country, as offences committed in a foreign country, such State would be free to do so and no rule of international law would impose upon it an obligation to do otherwise.

From this point of view the formula adopted by the American draft is very much better, at any rate as regards criminal cases. Article 25 is as follows: "Diplomatic agents shall be exempt from the civil or *criminal* jurisdiction of the nation to which they are accredited. They cannot be prosecuted in civil or *criminal* matters except in the Courts of their own countries."

We now come to immunity from jurisdiction in civil and commercial matters.

It is first of all necessary to mention that, *in principle*, international usage recognises this immunity of diplomatic agents without distinguishing between acts performed by them in the exercise of their functions and those which they perform in a private capacity.

Nevertheless, Italian jurisprudence contains two judgments by the Rome Supreme Court of Cassation—one dated April 20th, 1915 (*Rivista di diritto*

[1] This article includes exemption from land taxes on the legation building among exemptions affecting *the person* of the diplomatic agent.

*internazionale*, 1915, page 217; *Foro italiano*, 1915, I, 1330); the other dated December 9th, 1921, and published on January 31st, 1922 (*Rivista di diritto internazionale*, 1924, page 173; *Foro italiano*, 1922, I, 334)—pronounced when this Supreme Court was not yet the only final Court of Cassation in the Kingdom—which affirmed the principle that the immunity of diplomatic agents from jurisdiction in civil questions only extends to acts performed in the exercise of their official functions, and accordingly does not apply to obligations contracted by them in their private capacity. These judgments of the Courts have been strongly criticised, however, even in Italy, from the point of view of international law as it exists to-day, and it cannot be said that in Italy the law is definitely settled in this sense.

Be that as it may, it is universally admitted that exceptions should be made to the principle of immunity from jurisdiction in civil and commercial matters. Nevertheless, when it comes to specifying these exceptions, we find considerable difference of opinion both in the doctrine and in the rulings of the Courts of the different countries.

We have therefore now to deal with controversial questions, with the solutions most frequently found for them in practice, and also with those solutions which seem to us to be the most reasonable.

For the sake of brevity, we will discuss these two kinds of solution together.

* * *

As regards the exceptions to the principle of immunity in civil and commercial matters, it will be well to pay attention to Article 16 of the Institute's draft and to Article 27 of the American project. The former is as follows: "Legal immunity may not be invoked: (1) in case of proceedings instituted as a result of engagements contracted by the exempt person, not in his official capacity, but in the exercise of a profession carried on by him in the country concurrently with his diplomatic duties; (2) with regard to realty actions, including possessory actions relating to property, real or personal, which is in the country."

The latter article is expressed as follows: "A diplomatic agent shall not be exempt from local jurisdiction even during the exercise of his functions: (1) for real actions, including possessory actions, relative to immovable property situated in the territory where the agent is accredited, and which is neither the house he occupies nor that of the legation; (2) for actions connected with his capacity as heir or legatee of an estate settled on the territory of the country to which the diplomatic agent is accredited; (3) for actions resulting from contracts executed by the diplomatic agent which do not refer to the seat or furnishings of the legation, if it has been expressly stipulated that the obligation must be fulfilled in the country where the agent is accredited; (4) in case of waiver of diplomatic immunity, which, however, cannot occur without the consent of the Government which the agent represents."

If we now enquire whether these texts are or are not in conformity with

generally recognised custom and, if so, in what respects, we must admit that the exception most generally agreed to is that relating to real actions, including possessory actions, regarding immovable property owned in a private capacity.

On the other hand, there are those who consider that the exception may be extended to any matter referring to immovable property owned in a private capacity, so that it would be permissible to take action against a diplomatic agent in regard to immovable property, even if it were not a real action. As for actions of the latter kind, the Institute draft considers them permissible whether they relate to immovable or movable property, while the American draft only sanctions real actions relating to immovable property. I have been unable to find a sufficient number of legal precedents to say whether general practice in this matter tends in the one direction more than in the other.

The most reasonable solution, however, would be to make no distinction with regard to reactions between those relating to movable property and those relating to immovable property. The nature of the subject-matter of the action in no way affects its legal character.

Thus, in regard to the question whether a person belonging to a foreign legation and engaged in some occupation in the country, more particularly that of trader, may claim the prerogative of immunity with regard to obligations contracted in the pursuit of this occupation, legal doctrine, according to the Institute draft, pronounces on the whole, and rightly too, in the negative. Nothing would justify the extension to professional activities of a privilege which can only attach to the exercise of diplomatic duties.

In Great Britain, however, case-law, by its interpretation and application of the celebrated Diplomatic Privileges Act of 1708 (7 Anne, c. 12), does not furnish in this respect a sure and definite rule. DICEY ("A Digest of the Law of England with Reference to the Conflicts of Laws," 2nd edition, pages 200 and 201), when mentioning the commercial activities of a diplomatic agent as an exception to the general rule of immunity, places a query against the rule thus set out (see also SATOW, "A Guide to Diplomatic Practice," 1917, 189 *et seq.*).

As regards the exception contained in Article 27, No. 3, of the American draft relating to actions resulting from contracts entered into by the diplomatic agent which do not refer to the seat or furnishings of the legation and which have to be executed in the country to which he is accredited, this seems perfectly justified, since the prerogative in this matter is not in the least necessary in order to guarantee the free and dignified exercise of diplomatic duties.

Nevertheless, it must be recognised that this exception is not admitted by the jurisprudence of certain countries, particularly France. The Tribunal de la Seine, for example, on July 27th, 1889, passed a judgment which became final which ordered a Belgian Counsellor of Legation in Paris to pay a certain

sum of money for the rent of an apartment, but this judgment was quashed by the French Cour de Cassation on January 19th, 1891, *in the interests of the law* (DALLOZ, "Jurisprudence générale," 1891, I, 9).

If the diplomatic agent voluntarily submits to local jurisdiction, it is generally held that the prerogative of immunity no longer exists. But whereas according to some authorities this rule should be accepted unconditionally, others declare that it is necessary for the diplomatic agent to have obtained from his Government permission to waive his prerogative.

In my opinion, the first solution is the one to be commended, especially when the diplomatic agent in question is head of a mission. It is his function to represent his Government and to be its mouthpiece, so that the local authorities must presume that acts performed by him which are *even indirectly* related to his duties are in conformity with the wishes of the Government of the country which he represents. As regards diplomatic agents of lower rank, the local authorities would have every reason to suppose that, in waiving their prerogatives, they did so with their chief's permission, especially as these questions of authorisation really only concern the relations between officials of the same country. The Courts, however, particularly in France, often decide to the contrary; but even in France it is impossible to say that the law is absolutely well established on this point (see DESPAGNET, "Cours de Droit international public," 4th edition, revised and enlarged by DE BOECK, Paris, 1910, No. 243, note on page 340).

Even if the diplomatic agent, who as plaintiff submits voluntarily to local jurisdiction, is furnished with the express authorisation of his Government, there still remain certain doubtful and controversial points. It may happen that the defendant, not content with merely questioning the exception, makes a counter-claim (*demande reconventionelle*). In that case, seeing that the diplomatic agent himself has submitted to local jurisdiction, it would appear to be reasonable to consider the ordinary law applicable. Several writers have expressed this opinion (compare, among others, PRADIER-FODÉRÉ, "Traité de Droit international public," Vol. III, Paris 1887, No. 1446; ULLMANN, "Völkerrecht," Tübingen 1908, pages 186 and 187). Others, however, have favoured the contrary solution (*e.g.*, compare BLUNTSCHLI, "Le Droit international codifié," in Lardy's French translation, 2nd edition, note on No. 140, bottom of page 123; DICEY, *op. cit.*, 2nd edition, page 199).

English law is uncertain on this question (see DICEY, *op. cit.*, passage quoted).

Exemption from the duty of giving evidence in court would not appear, in accordance with the usage generally adopted, to present any great difficulties in practice. However, if we compare Article 17 of the Institute draft [1] with

[1] This article is as follows: "Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the national Courts on condition that they give their evidence, if required to do so through the diplomatic channel, to a magistrate of the country appointed for this purpose, and this evidence may be given even on the premises of the mission."

Article 28 of the Washington draft,[1] we find differences which possibly extend beyond differences of drafting, for, whereas the Institute draft affirms the duty of the diplomatic agent to give evidence, although in the customary privileged forms, the American draft is content to state that, if the evidence is necessary, it must be requested in writing and through the diplomatic channel, without adding anything as to the duty of the agent to give it.

On this point the Institute draft takes better account of the interests of justice, but possibly the Washington draft is more in conformity with actual practice.

With regard to the duration of diplomatic prerogatives, it may unhesitatingly be claimed that inviolability lasts (according to what is stated in Article 5 of the Institute draft) for the whole period during which the Minister or diplomatic official remains in his official capacity in the country to which he has been sent. Article 29 of the American draft is expressed differently, namely, as follows: "The inviolability of the diplomatic agent and his exemption from local jurisdiction shall begin from the moment he crosses the frontier of the nation where he must exercise his functions; they shall terminate the moment he leaves the said territory."

In the first place, it may be objected that, according to general opinion, the official capacity of the diplomatic agent is only proved by the presentation of credentials, whereas, at the moment when he crosses the frontier of the State to which he is sent, no credentials have been presented. Further, as regards the duration and termination of the privilege of immunity from local jurisdiction, it cannot be accepted absolutely and as a general truth that the prerogative should cease with the departure of the diplomatic agent. Article 14 of the Institute draft makes a very judicious distinction and one so well founded in law that it may be regarded as a rule of existing positive law. This article declares that immunity survives the official's functions in respect of actions relating to the exercise of these functions. As regards other actions, immunity may only be claimed for as long as these functions are being exercised.

Article 26 of the Washington draft says the same thing, but appears to be in contradiction with Article 29 of the same draft as quoted above.

It may also happen, however, that the diplomatic agent has contracted an obligation in his private capacity *prior* to entering on his duties, and that the other contracting party claims before the Courts the fulfilment of that obligation in the country to which the diplomatic agent is sent, *while* he is still exercising his functions. The case arose in France in respect of a Persian who, while in France, had signed a bill of exchange as surety. The holder of the bill of exchange, who had not received payment, summoned the surety in

[1] Article 28 of the Washington draft is as follows: "The diplomatic agent may refuse to appear as a witness before the Courts of the country to which he is accredited. In case the evidence should be necessary, it must be requested in writing and through the diplomatic channel."

the French Courts at a time when the latter had been appointed Persian diplomatic agent in Paris and was actually exercising his functions. The Paris Court of Appeal, by a final judgment of May 7th, 1914, which confirmed a judgment given by the Tribunal de la Seine, ordered the Persian diplomatist to pay the sum claimed. The Supreme Court of France, however—on this occasion also *in the interests of the law*—quashed the judgment of the Paris Court by a judgment dated August 3rd, 1921 (CLUNET, *Journal de Droit international*, 1921, page 922; SIVEY, *Recueil général de Jurisprudence*, 1921, Part 1, page 121).

It must be admitted that the opinion given by the French Cour de Cassation is perfectly logical, if we accept the principle that, during the exercise of his duties, the diplomatic agent is protected from all legal actions, even in respect of acts performed in his private capacity.

Further, very delicate questions arise with regard to the legal situation of diplomatic agents when in the territory of a third country. Clearly they cannot claim all the privileges which belong to them in the country to which they are sent. On the other hand, they ought to have certain prerogatives sufficient to ensure that they will not be prevented from reaching the country to which they are sent. Dr. Mastny drew my attention to the fact that, when journeying to the country of their mission, they can avoid all difficulties in third countries by travelling as "couriers." Dr. Mastny would like to see European countries adopt the system which is recommended for the United States of America in Article 29, paragraph 2, of the Washington draft, as follows: "The diplomatic agent who, in going to take possession of his post or in returning therefrom, crosses the territory of an American Republic or *is accidentally there during the exercise of his functions* shall enjoy in that territory the personal immunity and immunity from jurisdiction referred to in the preceding articles." But what is the exact meaning of the words "accidentally there during the exercise of his functions"? Do they mean that, in order to enjoy his prerogatives, the agent must actually be in course of exercising his functions? Or is it sufficient that at that time he should be the holder of a diplomatic post, even if on leave? Whatever the answer, it is impossible to say that the ruling arising out of the Washington draft as just quoted corresponds exactly to existing law as interpreted by international custom.

Until a reform is effected by treaty arrangements we consider that, according to *existing* international law, diplomatic agents are only entitled to claim their prerogatives in third countries while they are journeying to the country of their mission or returning therefrom. This opinion is expressed in the Italian law of May 13th, 1871 (Article 11, last paragraph), relating to the guarantees enjoyed by the Holy See for diplomatic agents appointed by the Pope and required to exercise their duties in a foreign country.

* * *

We come finally to the question as to the persons to whom diplomatic privileges extend. We may first note that these prerogatives are generally

recognised as attaching not only to the head but to the whole *official* staff of the diplomatic mission. There is also practically complete agreement that they apply to members of the family of the diplomatic agent living with him. The latter regulation is adopted without any restriction in Article 30 of the American draft [1]. The Institute draft also adopts it explicitly as regards immunity from taxation (Article 11) and immunity from jurisdiction (Article 12), but, with regard to the privilege of inviolability, this draft (Articles 2–6) does not mention the members of the family of the diplomatic agent, although in Article 7 it recognises the prerogative of ex-territoriality as applied to their residence.

I am of opinion that, in practice, diplomatic immunities are usually extended to members of the families of diplomatic agents who live with them.

In this matter, as is well known, the point most often discussed and most open to question is that which refers to *unofficial* personnel. In the case of these persons, there is no question of applying all the prerogatives without distinction but only certain of them. Queen Anne's famous Statute of 1708 mentions, among persons in the suite of a diplomatic agent to whom is extended the privilege of immunity from local jurisdiction, "servants and domestic servants" and, according to DICEY (quoted above), English law interprets these words to mean that that privilege extends to anyone belonging to the suite of a diplomatic agent without distinction of nationality.

Italian legal practice gives a totally contrary decision. A judgment by the Rome Court of Cassation given on November 7th, 1881 (*Rivista di Diritto internazionale*, 1908, page 350), adopted the ruling that the prerogative of immunity from territorial jurisdiction cannot be applied to personnel which has neither the character nor the duties of diplomatic agents (compare also French Court of Cassation, October 13th, 1865; DALLOZ, Feburary 1866, I, 233; VINCENT and PÉNAUD, *Dictionnaire de Droit international privé*, 5th diplomatic agent, page 80, No. 101).

Finally, there is a middle solution which was explicitly adopted in article 19 of the German *Gerichtsordnungsgesetz* of 1898, recognising in the Reich the prerogative of immunity from jurisdiction as regards not only official personnel (*Geschäftspersonal*) but also persons in the service of a foreign diplomatic agent, *provided that they are not of German nationality.*

The last solution may be regarded as commonest in practice. It was also adopted in the Washington draft, Article 30 of which concludes by saying that "exemption from local jurisdiction extends likewise to their servants; but if the latter belong to the country where the mission resides, they shall not enjoy such privilege except when they are in the legation building."

[1] This article states: "The inviolability of diplomatic agents, the exemption from taxes and jurisdiction, as well as the other immunities which they enjoy and to which the preceding articles relate, also extend to all those who form part of the official personnel of the diplomatic mission, and to the members of their families who live with them. . . . "

Even the Institute draft (Article 2, No. 3) contains a regulation[1] which at least in form bears a certain resemblance to the Washington rule. It must be observed, however, that the Institute draft confers no prerogative of immunity from jurisdiction upon unofficial personnel, of whatever nationality, but only recognises the prerogative of inviolability.

Putting aside *for the moment* all considerations as to the intrinsic worth of the regulations adopted *on this point* in these drafts, we must note that in neither case is the wording very happy. The fact that a person in the service of a diplomatic agent is in the legation building cannot give rise to any *personal* privilege. He will certainly be inviolable as long as he remains in the building, but the same applies to anyone in a legation building, owing to the inviolability of the legation itself. It is therefore not easy to understand exactly what is meant by the Washington regulation whereby a legation servant belonging to the country in which the mission resides shall enjoy exemption from local jurisdiction when he is in the legation building. Does it mean that, so long as he remains in the legation, he cannot be arrested or have a writ served *directly* on him by a public official of the country? If this is so, we can only repeat what we said on the Cambridge draft. Or was it intended to mean that, for as long as the servant remains in the legation building, no proceedings can be begun against him by the local authorities? If the latter interpretation were accepted, it would create a disguised and absolutely unjustified right of asylum.

It is unnecessary to say that these remarks are not made in any hypercritical spirit, but are intended solely to prepare the material for laying down principles which are in accordance with the requirements of scientific doctrine and of practice.

On this point we should very much simplify matters if we admitted that diplomatic prerogatives extend *only* to heads of a mission, members of their families living with them and persons belonging to the *official* staff. Such a regulation would be justified by the fact that there is no legal reason (tradition alone is not enough) for extending prerogatives which were created for diplomats by reason of their functions to persons who have no diplomatic standing. There would be the further great advantage of precision. It is perfectly easy to distinguish official from unofficial personnel, since only the former is accredited to the Ministry of Foreign Affairs of the country.

* * *

I have suggested accordingly—and in principle Dr. Mastny is *de jure condendo* favourable—a reform which we think it would be desirable to intro-

[1] Article 2: "The privilege of inviolability extends (1).....; (2).....; (3) to all persons belonging to his *unofficial* staff, subject to the proviso that, if they are nationals of the country in which the mission resides, *they shall only enjoy the privilege within the mission building.*"

duce into the practice followed in most countries with regard to the persons to whom diplomatic privileges should be extended.

But there are other suggestions to be made on this question.

As regards the prerogative of inviolability (apart from the question of the persons to whom it should apply, a point to which we need not revert), I have no reform of any real importance to suggest. It is only necessary to give the most exact definition possible to the existing state of affairs, particularly in order to remove doubts which may arise in determining the exceptional cases in which the diplomatic agent cannot claim this prerogative. In doing this, it would be well to consider Article 6 of the draft by the Institute of International Law.

With regard to immunity from taxation, I can, even *de jure constituendo*, only refer to what I have already said in the foregoing pages.

The most important point in which I consider that a reform would be not only useful but necessary is that which relates to immunity from local jurisdiction. As regards immunity in penal matters, things could be left substantially as they are, subject to framing rules with the utmost possible precision. It must be admitted that, if a diplomatic agent could be harassed with proceedings of a penal nature [1] instituted against him, for whatever reason, in a criminal court, his independence, his freedom of action and peace of mind, as well as his dignity, might be impaired.

As regards immunity from jurisdiction in civil and commercial questions, the dignity, prestige and independence of the diplomatic agent can be sufficiently safeguarded if immunity is granted for acts performed by him in the exercise of his duties, but not for those performed in his private capacity.

Dr. Mastny is not absolutely opposed to this proposal *in theory*, but he thinks that it would be open to many objections in practice. It would carry me too far to attempt any detailed reply to Dr. Mastny in this report, and I will content myself with the following remarks. When reforms are to be made, we should not be put off by the consideration that a different system has hitherto been followed. There is no really compelling reason for adopting the same system in criminal and civil matters. I have already shown that the exclusion of immunity in criminal questions would involve consequences incomparably more serious than in civil and commercial questions. In constitutional countries members of Parliament enjoy special prerogatives as regards penal justice, but no one has ever suggested that they should enjoy the same prerogatives with regard to judicial proceedings taken against them in their civil or commercial relations. It is sometimes easy to determine straightway whether a diplomatic agent has acted in his official rather than in his private capacity. In any case, it would be for the plaintiff who brings an action in civil law against a diplomatic agent to prove that the defendant was acting in his private capacity. We could still follow ancient

[1] It would be a different thing if the diplomatic agent were summoned to appear before a local court in virtue of his *civil* responsibility.

custom as regards the form in which a diplomatic agent should be summoned to appear before the local courts, and it could be forbidden to serve a summons not only at the legation but also on him in person (*in persona propria*). And if judgment were given against a diplomatic agent it could be made impossible for measures of execution to be enforced within the legation or even at the private residence of the agent.

If we were to examine the historical development of diplomatic prerogatives, we should find that, with the advance of civilisation, these prerogatives tend to contract rather than to expand.

Speaking, as I am, to experts, I need not remind them that in times past diplomatic agents claimed the privilege of inviolability not only as regards their persons, their property and the seat of the legation, but also for the whole quarter in which they resided. To-day, however, there is not only no question of an alleged right of *quarter*, but not even of a right of inviolability in respect of the whole of the building in which the legation is situated, should it be confined to a single set of rooms in a palace or house (as happens in the case of legations belonging to the less wealthy countries).

We have already mentioned how many questions there are in positive international law which are still not accurately and definitely settled, especially in the matter of immunity from local jurisdiction in civil and commercial questions. If the reform here recommended were to be carried through, most of these controversial questions would disappear, with great advantage to the progress of law and the maintenance of friendly relations.

In this report there has nowhere been any question of the prerogatives belonging to officials of the League of Nations. We were unable to deal with this very important matter (regarding which there is already a draft by the Institute of International Law, approved at the Vienna meeting of 1924) without going outside our terms of reference.

This subject is worthy of a special convention, in which account will have to be taken of the very remarkable differences between *definitely* diplomatic functions and those of officials of the League of Nations.

If a general international agreement is not shortly concluded on this matter, and if all the privileges belonging to diplomatic agents are consequently to continue to be granted to officials of the League of Nations (or at any rate to some of them), there will be all the more reason for generally limiting the prerogative of immunity from local jurisdiction in civil and commercial matters to acts performed by diplomatic agents in the exercise of their functions.

* * *

Before concluding this long report, I must point out that Dr. Mastny in his friendly reply did not confine himself to discussing the proposal put to him, but also made a proposal himself which constitutes an entirely original contribution and which accordingly deserves to be examined and discussed with

the greatest care and thoroughness. Substantially, he proposes the adoption of *conciliation procedure and arbitral jurisdiction* for *all* acts, whether official or private, performed by a diplomatic agent. For this purpose, a special court would be set up in each capital to deal with these questions, and it would contain representatives of the diplomatic corps and of the local authorities. I do not desire to add further details lest I should misinterpret the ideas of the author of this proposal. I therefore leave it to him to explain his ideas to the Committee with the necessary detail.

Nevertheless, I fear that a reform of this kind would satisfy neither Governments nor individuals. The former would probably not consent to submit questions concerning acts performed by the diplomatic agent in the exercise of his duties to a jurisdiction of this sort, in which the local element would be in a majority and to which part of the diplomatic element would be chosen by chance. On the other hand, individuals would not willingly submit to a special jurisdiction of this kind, since it would not furnish them with all the guarantees which they enjoy in an ordinary court.

(*Signed*) Giulio DIENA,
*Rapporteur of the Sub-Committee.*

### II. LETTER FROM M. MASTNY TO M. DIENA

[*Translation.*]

Lomnice n. Popelku, August 20th, 1925.

Dear Professor,

After studying the question of diplomatic prerogatives in greater detail, I am in a position to communicate to you a few ideas which have occurred to me in the course of this examination. To begin with, I agree with you that the *entire* question of diplomatic privileges and immunities is suitable for treaty regulation, and I believe that such regulation would meet a general and long-felt need. Account should be taken of the draft regulation on diplomatic immunities adopted by the Institute of International Law at Cambridge (August 13th, 1895) and of the recent "codification" undertaken by the Pan-American Union (Project No. 22 of March 2nd, 1925).

According to the wording of Question (*c*), which comes within the competence of our Sub-Committee, the report should not confine itself *strictly to codification*, but should at the same time indicate "what provisions could be recommended" (page 49 of the Minutes).

Thus the terms of the question do not even exclude the preparation of a preliminary draft (page 47 of the Minutes).

Personally, I feel more inclined to decide in principle in favour of a report which, *without proposing a positive draft convention*, would determine: (1) the law as it stands at present (existing custom, positive provisions of international law, national legislation); (2) case-law on the subject; (3) present-day doctrine (controversial points); (4) suggested solutions of controversial

questions by interpretation; and (5) possible and desirable alterations and even reforms to take account of the new post-war conditions affecting the relations of the different countries. The work should be performed throughout with a critical eye to existing drafts (those of Cambridge and Washington) and the report should also indicate the scope of the reforms proposed.

In my opinion, a preliminary draft would only be appropriate as regards undisputed and purely legal questions which do not aim at any reform and, not least important, which would not affect the prestige of States, a factor which often plays a decisive part in the matter under consideration (compare the liberal interpretation given by the Courts). With regard to questions which are not entirely free from controversy, I am of opinion that only *the third part* of the resolution of September 22nd, 1924, would admit of treaty provisions in draft form.

As regards the subject-matter of the report, it was decided that the Sub-Committee would not be required to deal with consular privileges, but I think it would be very useful, in order to show the differences in theory, to touch on this question, if only superficially, and also on the immunities of heads of States.

I take it that the Sub-Committee's instructions are limited to diplomatic privileges and that it is therefore not called upon to deal with the *duties* (obligations) of diplomatic agents (see the Pan-American project) nor with the right of legations in general. In the event, however, of framing a positive draft, it would be very useful to determine more or less in detail the duties of public Ministers and especially their obligations in regard to local laws—and this would at the same time to some extent define the limits of their privileges.

It now remains to determine whether our investigation should extend to details of the classification of permanent diplomatic agents, to ceremonial rights, if and in so far as they still exist, to certain honorary prerogatives sanctified by custom (precedence, representative character, the right of dealing directly with the head of the State, etc.). I think that this question might be touched on, but without entering into details, because in the first place it has lost much of its former importance and, secondly, because it relates not to a right but to etiquette prescribed by usage in the country where the diplomatic agent resides. There is, however, one question frequently discussed in respect of diplomatic agents of the second class, and that is the question of the exceptional prerogatives which "ambassadors" (and nuncios) enjoy with regard to other classes nowadays, when the principles formerly observed (royal honours) in the creation of embassies appear to have been abandoned.

On the question of *what diplomatic prerogatives are at present recognised*, legal doctrine is, as far as I know, unanimous, although these prerogatives are differently classified and opinions differ as to their extent.

Current terminology is unfortunately confusing. Prerogatives, privileges,

immunities and ex-territoriality are all employed without any exact meaning being given to them. Ex-territoriality in particular is only too apt to lead to confusion.

I much regret that I have been unable as yet to consult your *Principi de Diritto internazionale*, which I have been expecting from Rome for the last fortnight, and which will give me the details of your theory of ex-territoriality. In the meantime I am against abandoning this term (as is done in Article 23 of the Washington draft) and I incline rather to the restrictive definition given by Strisower: "The removal of certain persons or certain portions of territory from the legal authority of the country in respect of matters to which, according to general principles, such persons and such portions of territory ought on the contrary to be subject."

I agree with those jurists who hold that the fiction "that certain persons or things *are situated* outside the State" is a fallacious figure of speech in permanent contradiction to the fact that "these persons and these things cannot escape from the sovereignty of the State"; but this opinion does not prevent me from favouring the retention, though only as a metaphor, of the expression "ex-territoriality," which has existed for centuries, "*diplomatic ex-territoriality*" including no more than certain exemptions from the authority and power of the State enjoyed by the diplomatic residence.

I admit that in principle no exemption (privilege) can be other than limited and that from a legal point of view a State cannot be called upon to renounce its sovereignty.

Ex-territoriality in the limited meaning of the word refers only to the legal exceptions recognised in any particular State, and these must always be interpreted in a restrictive sense. I am of opinion that ex-territoriality in this limited sense becomes a purely theoretical matter and that no exception could be taken to it even by those theoretical opponents who would restrict the grounds for granting diplomatic prerogatives to the "free exercise of official functions." It is obvious that there is no need to employ this term in practice, and that it is even preferable not to use it, in order to avoid misunderstandings or false interpretations.

In my opinion all prerogatives are based upon:

(1) Ancient tradition;
(2) The dignity and prestige of the State on the one side, and courtesy on the other;
(3) Independence (the free exercise of functions).

Theoretically, the last consideration should be decisive in interpreting doubtful cases. In practice, however, this is not so; hitherto prestige (and courtesy) have always prevailed over doctrine.

Bearing this in mind and considering the practical object of the work in hand, I am unable to subscribe either to the doctrine which refuses all protection in circumstances not connected with official dealings and which ac-

cepts only the principle of "free exercise," or to the theory which interprets all claims in favour of the privileged persons.

I consider that we must always keep in mind the three principles quoted above and attempt to find the happy mean (neither MONTESQUIEU nor LAURENT). This middle course should be followed, not only in interpreting existing law but in proposing reforms, and I am glad to see from your letter that you realise the part played by prestige.

We must remember that this principle of prestige will continually supply certain correctives to the increasingly restrictive tendencies of the present day, tendencies which are, indeed, perfectly natural when we consider the development of modern democracy in the international life of civilised States.

As regards the *individual prerogatives* in detail, I venture to submit for your consideration a few ideas in the nature of marginal notes which I have made during my study of the question.

(*a*) *Inviolability*, which is generally admitted and which is universally recognised in theory and hallowed by custom, is to the best of my knowledge a matter beyond dispute, as also is the question of where it ceases. It is difficult, however, to determine satisfactorily the cases in which inviolability could not be claimed. The Cambridge draft goes further than the Washington draft (Article 15), which has failed to mention that "there are cases when . . . " but, on the other hand, it expressly mentioned the obligations of diplomatic agents towards local laws (Articles 5 and 16).

The provisions of Article 4 in the Cambridge draft (and part of Article 30 of the Washington draft) are quite in accordance with practice and, *de lege lata*, just, but *de lege ferenda* I should be inclined to adopt the suggestion you have made to me, namely, that *inviolability and all other privileges* should be limited in principle to persons belonging to the *official staff*, appointed by the Government and (I will add) included in the list presented to the Ministry of Foreign Affairs by the head of the mission (the practice in Great Britain). This, of course, involves a change, since national laws and custom usually regard inviolability as extending also to unofficial personnel.

A proposal for reform along these lines would not be free from objections, in the first place as regards exemption from direct personal taxation, and also in respect of the private secretaries of heads of missions and their *chauffeurs* in cases when an offence may lead to the arrest or imprisonment of the latter.

As regards *the beginning and end* of prerogatives, I prefer the Cambridge (Article 15) to the Washington (Article 29) text, since it also covers the case of an agent who has stayed in a country before being accredited to it.

I would remark in parenthesis that jurists often speak of the "delivery of passports"; in practice, passports are no longer presented.

The question as to what measures a Government may apply in the case of an abuse of his inviolability by a privileged person is a disputed one and, in my opinion, difficult if not impossible to settle, since it will always be a *questio facti*. It would be impossible to enumerate these measures. The

attitude of the Government will depend upon the gravity of the case, its nature, the relations between the two States, etc.

The position of the public Minister (diplomatic agent) in regard to third Powers is a moot point, although in principle his right to "safety and courtesy" is generally admitted.

In practice, this question does not ordinarily raise any serious difficulty, since the diplomat who is passing through the territory of a third State can avoid any inconveniences by travelling as a "courier."

Article 29 of the Pan-American draft proposes that inviolability should continue for as long as the agent is exercising his official functions in the various American countries.

Could not a similar provision be considered in the case of European countries?

It is clear that diplomatic agents visiting the territory of third Powers either on official duty or privately cannot claim all (or the same) privileges that are granted to them in the country to which they are accredited, but official journeys by representatives of States (Ministers of Foreign Affairs, diplomatic agents in the strict sense of the term, officials of the League of Nations and other international officials) have for some time been so frequent and general that a settlement of this question would seem eminently desirable, and it would be well to systematise the different kinds of international representation created among States since the world war.

What, for example, is the position of an Italian official of the Secretariat of the League of Nations during a session of the Council at Rome or in Paris?

(See also Articles 15 and 14 of the Pan-American draft. Do international officials in the strict sense of the term enjoy more extensive privileges than diplomatic agents pure and simple? Is the international character of diplomatic agents inferior?)

(*b*) It is generally admitted that immunity from taxation is not absolute, but depends upon traditional legal usage in the different countries, on reciprocity, etc. There are, however, certain typical exemptions which are never disputed in practice and of which mention is made in the Pan-American draft (Article 24), as well as in the Cambridge draft (Articles 7–11).

If we wished to examine this question in detail, we should have to study the laws of the different countries, in order to fix by a process of elimination the absolute minimum for purposes of codification.

Exemption from Customs duties is nothing more than a usage dictated solely by considerations of international courtesy. Some States are generous in the matter, others less so.

This question and the question of exemption from Customs examination have caused and still continue to cause practical difficulties, but I quite agree with you that it is a matter for individual arrangements between the States in question and that in practice everything depends upon good-will, reciprocity and the tact of the privileged persons.

In my opinion the English instructions (see SATOW, "Diplomatic Practice," Vol. I, page 286) are most reasonable and calculated to satisfy the most exacting claims. Exemption is restricted to heads of missions.

If, however, it came to regulating the question by treaty, it would be also necessary to settle questions of detail (diplomatic parcels, account, etc.). There is no doubt about the point that the privileges can only extend to articles for private use.

As regards particularly the question of Customs *examination*, I consider it would be necessary to be content with a statement by the privileged person as soon as he has proved his diplomatic standing, this being a privilege connected with inviolability.

(*c*) *Immunities of the residence.* There is no occasion to appeal to "ex-territoriality" in order to explain this privilege (I may refer to my notes on the theory of ex-territoriality). The principle of the free exercise of functions combined with the "dignity and prestige" of the represented State sufficiently explain the theoretical grounds for this immunity. It would be really difficult to define in detail the circumstances which may lead to the termination or suspension of this immunity. Writers are divided in their opinion, and personally, I consider that the report should merely set out the present position in relation to theory and practice.

As regards the *right of asylum*, I am quite willing to subscribe to Article 22 of the Pan-American draft, but the question still remains without any doubt exceedingly difficult when we are dealing with political refugees in countries which have not yet attained that degree of civilisation which we are justified in expecting in normal international life.

The question is a political one, and in the Cambridge draft it was thought better to give no opinion. Experience, even of quite recent date, would justify treaty regulation and, if not the complete abolition, in any case a restriction of the right of asylum, together with explicit provisions in regard to procedure.

Clearly the abolition of the right of asylum cannot dispose of the question of the admissibility of *entrance into the diplomatic residence.*

I am in favour of compulsory resort to the diplomatic channel, except in cases of extreme urgency or of danger within the building.

(*d*) *Immunity from criminal* (*and police*) *jurisdiction.* I consider that Articles 6, 12, 13, 15 and 16 of the Cambridge draft faithfully reflect existing custom as sanctioned by the national legislation and the case-law of most countries.

As regards legal doctrine, there are serious differences of opinion as to the extent of this immunity, as to the measures of precaution and security to be taken by the Government in respect of a privileged person who has abused his immunity, and there are even differences in regard to the justification for this immunity. EMERSON'S ideas, and also LAURENT'S, brilliant and attractive as they are, presuppose conditions of the highest civilisation in all

countries and a standard of absolute justice which even in our days are not yet attained.

(*e*) Exemption from civil jurisdiction is doubtless the most delicate and most troublesome question of all. May I be allowed first of all to make a personal observation? In theory I feel strongly the need of a reasonable restriction of this privilege, whereas in my capacity as diplomat it would be my duty to defend prerogatives in their entirety. However, I do not think I am betraying the cause of professional prestige if, in theory, I accept the suggested reforms which you explained in your letter and which won my fullest sympathy as soon as I read them. Exemption from civil jurisdiction certainly raises great difficulties, and whenever a case occurs in practice—happily this is seldom—it is a cause of embarrassment, not only to Ministers for Foreign Affairs (who would no doubt all subscribe to the famous Memorandum of M. D'AIGUILLON), but often also to diplomatic agents themselves in view of the difference of opinion as to their power to waive their exemption without the consent of their Government (see Article 27, No. 4, of the Washington draft), and in view of their professional duty to uphold the principle of exemption, even in cases where they would prefer to appear before the local Courts in order to have actions wrongly brought against them dealt with promptly. In theory the matter most often referred to is that of debts contracted by diplomatic agents; but it must not be forgotten that there are a large number of other obligations in civil law in respect of which proceedings can be taken before the Courts and on which it may in practice be exceedingly difficult for a foreign tribunal to pronounce judgment, especially when proper verification necessitates the hearing of witnesses, or even a *post-mortem* examination.

The tendency of theory to restrict exemption from civil jurisdiction to acts performed in the course of an official mission is not, in my opinion, in any way damaging to the prestige of the represented State, nor derogatory to professional dignity, but I think all the same that I ought to draw your attention to the danger underlying the following objections:

(1) Existing national *laws* are for the most part inclined to favour absolute exemption (excluding, of course, generally admitted exceptions, such as real actions, trading, etc.). This is especially the case with English law (7 Anne, c. 12, paras. 3–6, April 21st, 1709), French law (Decree of the 13th Ventôse, Year 2) and the United States statute corresponding to the English statute.

(2) The principle of complete immunity seems to have been hitherto the rule of the French and English Courts (Judgments of the Cour de Paris, dated July 12th, 1867, and January 21st, 1875, of the Cour de Lyon, dated December 11th, 1883; Case of Magdalena Steam Navy Company *v.* Martin, etc.).

(3) Most *jurists* favour complete immunity. Some of those who uphold this view, however, admit that liberal interpretation and practice often un-

duly extend the limits of this privilege and that due caution should be observed.

(4) The Cambridge draft (Articles 12–16) and the Washington draft (Articles 25–27) decided in favour of immunity (but see paragraph 3 of Article 27).

(5) As this immunity is one of the immediate consequences of *inviolability* there is no need to distinguish between official and unofficial persons.

(6) Analogy with exemption from criminal jurisdiction (the full extent of which is not disputed) calls for uniform regulation (see the Cambridge draft).

(7) In practice it is often very difficult to distinguish the capacity in which a privileged person has acted, and sometimes it is even impossible to give an opinion upon the case before the details have come to light through judicial proceedings.

(8) The principle of the *prestige of States* demands exceptional protection, particularly in those cases in which the Courts would have to discuss *delicate private affairs* (family matters; publicity of the procedure; publication in the newspapers, etc.).

(9) Jurists opposed to immunity are assuming ideal *conditions* of civilisation, a degree of protection which is not yet everywhere attained in our times, since there are still divergences of opinion even on fundamental social ideas and the general principles of civil law (ownership). Take West and East! We cannot be blind to quite recent experiences (China, Russia).

(10) Material progress allowing direct communication between States (by telephone, telegraph) makes it possible for any matter to be promptly settled through the diplomatic channel.

From a practical point of view, all these objections seem to me to be rather serious, and I am not sure how they could be disposed of.

Most probably the American members of the Codification Committee will be opposed to proposals of reform which would prejudice the codification initiated in America.

So long as there is reason to expect that the Washington draft will be accepted by American legislation, it is clear that any reform at variance with the principles adopted in America would still further increase the already existing differences of opinion between the American and European schools of thought. This would be contrary to the main object, which is to effect a codification that will remove divergences and to attempt the unification of ideas by eliminating differences. We have therefore an additional reason for proceeding cautiously.

In practice, then, our report should be confined to explaining the present state of affairs, which, however, does not prevent us from emphasising all the points in favour of the modification of existing law or from replying to objections that have been raised. The decision will rest with Governments. In my investigation into immunity from civil jurisdiction it occurred to me to

seek a compromise which would at least partly satisfy the tendency to insist on national legislation (in cases not connected with official duties). I can only indicate in rough outline one of the suggestions which might be examined with a view to reconciling opposing views.

In essentials the idea is as follows:

(*a*) To confirm immunity as the general principle;

(*b*) To admit an exception in the case of all acts and circumstances not of an official character;

(*c*) To introduce a *conciliation* procedure and *arbitral* jurisdiction for *all* acts (both official and private).

Machinery: Establishment of an independent tribunal at the Ministry for Foreign Affairs:

(1) President: the doyen of the Diplomatic Corps; (2) members: an expert in the person of a professor of international law at the local university; (3) a professor of civil law; (4) another member of the diplomatic corps (chosen by lot); (5) a Civil Court judge (member of the Supreme Court of the country).

This body would have *competence* in *all* cases of civil proceedings against a diplomatic agent, assuming that the plaintiff does not prefer the jurisdiction of the defendant's country.

*Procedure* in three stages:

I. The Court would have to decide upon the character of the case (official or unofficial);

II. Conciliation procedure:

If the conciliation procedure failed, it would be necessary to distinguish between:

(*a*) Official case: file to be sent to the Ministry for Foreign Affairs for diplomatic action (plaintiff retains the right to apply to the Courts of the defendant's country);

(*b*) Cases having no connection with official functions; in these cases resort would be had to:

III. *Arbitration.*—If arbitration were made compulsory or if the parties submitted to it voluntarily, there would be nothing abnormal in the procedure, and the Court could decide the case *in merito.* If, however, conciliation procedure were still to be observed even as regards the third stage, the Court would only have to give its *opinion in merito:*

(*a*) If the opinion were not accepted by the plaintiff, he could still apply to the Courts in the defendant's country;

(*b*) Refusal by the diplomatic agent would be interpreted as willingness to submit to the national Courts of the country in which he resides.

As I said, I am merely outlining my first idea, which would of course have to be developed; but arbitral jurisdiction, which is so popular nowadays, necessarily suggests itself as one of the means which can be employed.

(See also, for example, the Statute of the Austrian "Oberhofmarschallamt," the competence of which was limited to cases of voluntary submission by persons enjoying the privilege of ex-territoriality.)

I do not think it necessary to deal with the other exceptions to exemption (real action, etc.), although a critical examination of the wording of the Cambridge and Washington drafts on this matter would serve a useful purpose in connection with this problem.

(*f*) *Exemption from the duty of giving evidence* presents no difficulties (Cambridge, Article 17; Washington, Article 28).

(*g*) *The right of jurisdiction* as regards the personnel of the mission and *voluntary jurisdiction.*

Theoretically, some order would need to be brought into the chaos of divergent opinions. I do not think that it is necessary to go into details in this report: it would suffice to note in quite general terms the principles and the theoretical interpretation, without touching upon the question of ex-territoriality.

(*h*) *The right to the exercise of religion.* Is this still a practical question now that freedom of worship is generally recognised in all civilised countries? (Article 10 of Cambridge draft). Moreover, the immunity of the building offers sufficient protection.

As regards the question of who the privileged persons are, I entirely share the opinion expressed in your letter (although opposed to practice), namely, that the privileges of diplomatic agents should be limited to official personnel and, as regards members of the family, to the wife and relatives in the direct line living with the privileged person.

With regard to extraordinary representatives, officials of the League of Nations, commissioners, couriers, etc., I will refer to what I have already said above (see also the Washington draft, Article 2 and Article 15).

These are the ideas which I think it my duty to put before you, with the request that you will regard them as mere marginal notes.

I shall be very happy if, within the modest limits of my capacity, I have been able to be of use to you, for it was with that sincere desire that this letter was written.

(*Signed*) Dr. A. MASTNY.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 4

*adopted by the Committee at its Second Session, held in January 1926*

# RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS

The Committee is acting under the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee,[2] consisting of M. GUERRERO, Rapporteur, and M. WANG CHUNG-HUI.[3]

The nature of the general question and of the particular questions involved in it appears from this report. The report contains a statement of one theory as to the principles governing State responsibility in the matters considered and of the particular solutions derived from these principles. The Committee considers that this statement indicates the questions to be resolved for the purpose of regulating the matter by international agreement. All these questions are subordinate to the larger question, namely:

"Whether and in what cases a State is responsible for damage suffered by foreigners within the territories under its jurisdiction and to what

[1] See the Assembly Resolution adopted September 22nd, 1924.

[2] M. De Visscher was also appointed on this Sub-Committee but he was unfortunately prevented from taking any part in the preparation of the report.

[3] Mr. Wang Chung-Hui signed the original text of the Sub-Committee's report. Having unfortunately not been able to attend the session of the Committee of Experts, he is not responsible for the actual text as annexed to the present document, this text containing certain amendments made by the Rapporteur in consequence of the discussion in the Committee.

extent the conclusions of the Sub-Committee should be accepted and embodied in a convention between States."

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the general principles of responsibility set out in the report or the solutions for particular problems which are suggested on the basis of these principles. At the present stage of its work it is not for the Committee to put forward conclusions of this nature. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in the conclusions of M. Guerrero's report.[1]

In the same spirit, the Committee begs to refer to M. Guerrero's report for the details when it submits to the Governments the following question, which is closely related to the main question brought to their attention above.

> "Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted."

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

## ANNEX

## REPORT OF THE SUB-COMMITTEE

M. GUERRERO, *Rapporteur.*
M. WANG CHUNG HUI.[2]

1. *Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners.*

[1] *Infra.*
[2] See note 3 on preceding page.

2. *Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted.*

[*Translation.*]

Before considering the question of the international responsibility of States for damage done to foreigners, we think it will be advisable to examine not only the genesis of international law but the history of its growth, which is totally unlike that of national law.

Our inclination to do so is strengthened by the fact that the question itself —in the form in which it is stated—might be regarded as a contradiction in terms, because it refers in the same breath to international responsibility, which can only arise out of the violation of an international duty, and damage caused to individuals, which is exclusively a question of domestic law.

In making this preliminary survey, we shall rely on the data provided by legal researches which have been successfully conducted within the last few years, principally by the German and Italian schools.

## I

For many years the juridical nature of international relations was denied by a number of authorities, but now the contrary view is almost universally accepted and is assuming definite shape as a legal doctrine.

The modern conception, however, is by no means founded on an idea substituted for that of *jus naturale*. It is the outcome of a logical sequence of scientific investigations; the result of a careful study of the various stages of the evolution of international law.

The absolute need of social intercourse created a need for law, that is to say, a set of standards to which the whole community had to conform. Indeed, it is impossible to conceive of any community, however small, without means of compelling its members to conform to its rules. These rules are determined by the nature of the relations between individuals, and by an equitable adjustment of the services they render. The compelling force which binds together the various individual interests of a community becomes a rule of law as soon as it engenders rights and duties.

In relations between States, rules are the result of the will to create a social order governed by laws applicable to all.

So long as every State led an isolated existence, there could be no coordination of mutual relations. It was not until States realised that they had interests in common that they organised themselves into an international community. In so doing, however, they did not sacrifice their individuality. They merely combined their several wills in one common will and thus created law. This law is superior to all others, because it is the sum total of the wills of all nations, and the will of each nation is itself superior to the will of the individual.

International law, thus established with all its juridical standards, dominates the will of individual States and governs the relations of the whole family of peoples in a manner so undoubtedly binding that no State can disregard it. The authority of each State is subordinate to the higher authority of the international community. The binding character of international law is founded on the free consent of States thereto—the consent of all States and not merely the consent of some. In other words, the unilateral will of one State or the collective will of a number of States is not sufficient to create legal rules binding on the whole community of States.

Therein lies the fundamental difference between national law and international law. The will of the individual State is all-powerful in the creation of the former, but it cannot create the latter. Only as a manifestation of the collective will of all States can international law assume a tangible, positive and objective form.

In endeavouring, therefore, to ascertain the existence of an international responsibility—a point which we shall discuss later—we must not look to find the duties from which it derives outside the boundaries of that international law which has been formed by the wills of separate States coalescing in one single will.

The common will to establish some given rule as a legal international norm is expressed by formal or tacit agreement between the nations. Such agreement may or may not be in writing; but in either case, if it is carried out in practice, it is none the less the expression of a will which is destined to govern the mutual relations of the States. Whether it be termed a treaty or an international usage, whether it be founded on a *Vereinbarung* between States —as the German school would call it—or on international custom, the agreement is equally positive and binding. It is a manifestation of a common will and it embodies all the elements which characterise international legal rules. The force and authority of this will is equally valid, however it may be expressed: so much so, indeed, that the translation of a rule of customary law into written law neither modifies its nature nor increases its value; for instance, the violation of the immunity of diplomatic agents is not rendered one whit more or less serious by the fact that such immunity has or has not been formally recognised in a treaty.

It is none the less obvious that all treaties and usages must be regarded as sources of positive law, but no treaty or custom between two States can be held to be a source of law if it is in opposition to the will of the other States which form part of the community of peoples.

In our report, therefore, we shall constantly make use of this criterion of a collective will as evidence of the existence or non-existence of international responsibility. We shall thus avoid the old pitfall which has so often proved fatal to others who, after wandering far from the domain of international law, have sought to regain their foothold by grasping at ideas and notions which belong to quite a different sphere.

As we have shown, the body of law established by the will of international society is the only law which can govern the mutual relations of States, in other words, the rights and duties which States have accorded to or imposed upon themselves in their relations *inter se*. The violation of any of these rights involves the international responsibility of the offending State. Consequently, the injured State is alone entitled to complain. Under this system, States alone possess international rights and duties.

Individuals do not come within its scope. They move on a lower plane, where their lives are regulated in accordance with standards set up by a single will—the will of the State. In their own sphere individuals possess rights and duties and can accordingly incur responsibility, or, correlatively, invoke the responsibility of the State to which they belong. This body of rules, which governs the rights, duties and responsibilities of a State and of the individuals under its jurisdiction, constitutes domestic law, which is different in every respect and circumstance from international law.

According to the above definitions, therefore, the individual is not a subject of international law, and the violation of a rule of international law does not involve the individual in any responsibility.

Similarly, as international law imposes duties on State, only the individual is incapable of committing an offence against that law.

Any other interpretation would be tantamount to reverting to universal relations under the *jus naturale*, which is contrary to the system of positive international law.

Consequently in the present state of international law, as it ought to be defined, we can no longer admit the expressions which are still commonly used—of "international rights and duties of individuals" or "offences committed by individuals against the law of nations"—which are to be found in several treaties and legislations. The State is no more capable of violating the international rights of a foreigner—for the foreigner possesses no international rights—than the individual is capable of disregarding international obligations.

The error in question is due to an inexcusable confusion between national law and international law; between the law which governs the relations of the individual to the State and that which governs the relations of the State to other States. It would amount to regarding individuals as subjects whereas they are only objects.

This erroneous interpretation is often met with in international practice when claims are made for damage done to foreigners. The State which makes the claim, instead of doing so on its own behalf, comes forward as mandatory of the person who has suffered the damage.

The true rule should be that the individual may invoke the responsibility, under domestic law, of the State in which he resides; but that international responsibility may only be invoked by States.

## II

After thus briefly examining the foundations of international law and one of the differences between domestic responsibility and international responsibility, it will be easier for us to deal with the first part of the question raised in I.

### *First Question*

### Whether a State may be held responsible for Damage done in its Territory to the Person or Property of Foreigners

The responsibility which we have to determine is international responsibility, *i.e.*, responsibility resulting from the violation of international law. We have seen that international law is the outcome of a collective will. We shall next seek to ascertain the circumstances in which such a collective will has been formed as regards the reciprocal rights and duties of States in the matter of the protection of nationals abroad.

This will, which is the creative force of international law, was first manifested when the international community came into being. States then realised that they had common interests which could only be harmonised by the rational organisation of inter-State relations. The community once formed, new States are admitted to it by an act of high importance, and the community, which has already observed the pre-natal growth of the new State, examines its legal capacity, and is only ready to grant recognition if the new State can in return offer satisfactory guarantees. For its part, the new member, by the very fact of its recognition, is committed to the observation of its international duties.

To discover these duties, and their correlative rights, we must go back to one of the two sources of international law: treaties, or customary law. Doctrine only merits relative consideration as a means—sometimes a satisfactory means—of throwing further light on juridical rules and rendering their formation easier. Doctrine as a creative source of law has even less force than the unilateral will of States. It has no power to determine what is the unanimous will of nations. It may, however, become law by its incorporation in international practice; but in that case the source of such law is custom and not doctrine.

As regards the protection of foreigners, customary law lays down certain rules which clearly express the definite will of States regarding the rights which they agree to accord to foreigners, the manner in which foreigners are to be treated, the method of determining the State which is responsible for their protection, and the means of ensuring such protection.

It will be of interest to examine these rules because we shall have to revert to them every time we seek to establish the constitutive elements of an international responsibility. We shall summarise the rules, briefly, in order to remain within the limits of our task.

1. *Rights.*—Some rights are not rights created by States for the benefit of their nationals or of foreigners; namely, the right to life, the right to liberty and the right to own property. The community has simply recognised the existence of these rights and States have mutually undertaken to ensure the possibility of enjoying them.

This undertaking is so nearly universal that many authors have been unable to resist the temptation to regard these rights as international rights of the individual. But in so doing they have committed the fundamental error of attributing to the individual a character which he does not possess—they have made him a subject of international rights and duties.

In speaking of rights, therefore, we mean that these individual rights ought to be recognised by all nations. In fact, wherever a man goes he takes his rights with him, and wherever he is it is the will of all States that these rights should be safeguarded. Before these rights, nationality sinks into the background, because they belong to the man as a human being, and are not, accordingly, subordinate to the will of the State.

This, however, is not equivalent to stating that the undertaking to safeguard these rights constitutes an absolute guarantee against any action to the prejudice of such rights, or that the State is responsible for any infringement of such rights. Their recognition simply implies the duty of surrounding the individual, whether he be a national or a foreigner, with adequate means for defending them.

2. *Treatment.*—Here also the will of the community of peoples is clearly defined. It accepts the above-mentioned rights as being the minimum which a State should accord to foreigners in its territory, but it does not thereby recognise the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals. In any case, a State owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically.

3. *The Protector State.*—Nothing can be more logical than the desire of States to have it laid down that protection must be afforded exclusively by the State in the territory of which the foreigner happens to be.

This is easy to explain. Protection involves certain positive acts that can only be performed by the State possessing the sovereignty. Any duality of sovereignty would be inconceivable, for one sovereignty would exclude the other. The will of the States, in this matter, may be adequately expressed as follows: No trespassing on the sovereignty of another, and no renunciation, in however small a degree, of this essential prerogative.

Dual protection would, moreover, constitute a twofold and unjust inequality—first, from the point of view of the nationals of the State in which the foreigner resides, who are only protected by their own State; and secondly, from the point of view of the foreigner's co-nationals, who remain in the home country. A person leaving his country, and thus depriving it of his personal effort, would possess the privilege of being protected both by the State of origin and the State of adoption.

4. *Methods of affording Protection.*—As to methods, the will of the international community has not been expressed in positive terms. Its duty is to protect foreigners, but not to determine the methods to be employed.

In other words, every State is free to select its own ways and means of affording protection. The reason for this is obvious. The affording of protection is an element of national law, a field in which the will of the State is the supreme arbiter. It admits of no intermediary.

Nevertheless, the general means employed are almost everywhere the same: the laws and organs of the State. There is no other way of ensuring the observance of a duty involving a series of acts which are themselves subject to decrees of the State.

The State, however, remains free to organise its internal existence as it thinks best. What is required of the State is the fulfilment of the international duty: how it does so matters little.

But, although the State is perfectly free to select what methods it prefers for the protection of foreigners within its territory, it is not free to restrict its responsibility to cases of violation of the arrangements which it has made. Responsibility may be incurred by failure to adopt methods which should have been adopted or by the inadequacy of the methods actually adopted.

The above considerations will help us to formulate an answer to the first question asked. States are bound to conform to definite rules of conduct in respect of foreign nationals within their territory. If these rules are violated, and if, in certain circumstances, damage is thereby caused to such foreigners, the State in question may be held responsible to the State of which the foreigners are nationals.

We say "in certain circumstances," because damage does not *per se* imply international responsibility. For international responsibility to exist, the damage must be the result of a violation, by the State itself, of some international rule. Such violation may be positive or negative. It is positive when the State commits an unlawful act, contrary to international law; if, for instance, by a national law, it declares property owned by foreigners in its territory to be State property, without granting any compensation. It is negative when the State omits to fulfil a positive duty; for instance, when it fails to provide a judicial organ before which foreigners may defend their rights.

In both cases, the State has failed to fulfil an obligation which it voluntarily and freely assumed as a member of the international community—the

obligation to accord to the individual certain rights, including the means of defending these rights. The State of which that individual is a national is wronged, in the first case by an act contrary to international law, and in the second case by an omission to fulfil an international duty. The responsibility is, therefore, international, because the act, or the omission, is to be laid at the door of the State itself.

Nevertheless, in order to establish international responsibility beyond doubt, care should be taken to ascertain that an international right does exist, and that it is not merely a case of some damage—no matter what—having been suffered by a foreigner.

The same act may, according to circumstances, be contrary to international law, or quite unconnected with international law. For instance, if a State were bound by treaty to grant to the nationals of another State treatment as favourable as that which its domestic legislation accorded to its own nationals, any infringement of the rule would involve the international responsibility of the former State. An illegal act would be imputable to that State. But, if no such treaty obligations had been incurred, no responsibility could be invoked, because the other source of international law—customary law—does not impose this obligation.

When we speak of an illegal act committed by the State, we mean an act done by the organs through which the State performs its functions and which enable it to fulfil its international duties.

Every one of these organs, whether it be legislative, administrative or judicial, can commit an illegal act, contrary to the rights of another State, imputable to the State to which the organs belong, and consequently involving that State's responsibility.

Should any act or omission, in the circumstances mentioned above, cause damage to foreigners, international responsibility would arise, not by reason of the damage suffered, but because of an infraction of international obligations which the State was bound to fulfil. In the case now under consideration the obligation arises from the fact that States are bound to afford protection to foreigners under their jurisdiction.

We say "under their jurisdiction," and by this we mean that protection must be afforded in all territories over which the State exercises its sovereignty, though it cannot be afforded outside these limits. Consequently, a State is bound to fulfil this obligation in its colonies and protectorates, but is not bound to do so in any part of its colonies or territories which may, temporarily or finally, have ceased to be subject to its sovereignty.

In the latter case, the duty of protection would devolve on the State occupying such territory.

In composite States, the infraction of an international rule by one of the component States of the federation involves the responsibility of the central power, which represents the State in its international relations. The central power may not advance the argument that the component State is autono-

mous; it cannot, any more than a centralised State, plead the independence and autonomy of authorities of a member State in order to avoid responsibility for, say, some legislative act. An argument of this kind, which might be admissible in domestic law, is inadmissible in international law, because, as regards relations between States, the community of nations only recognises the authorities which represent a State in external affairs.

As regards composite States, the question has been satisfactorily settled in Article 4 of the Regulations adopted by the Institute of International Law at its session of September 10th, 1900, where it is laid down that "the government of a federal State composed of a certain number of small States, which it represents from an international point of view, may not plead, in order to avoid the responsibility resting upon it, the fact that the constitution of the federal State does not give it the right to control the member States, nor the right to exact from them the discharge of their obligations."

## III

### *Second Part of the First Question*

### In what Cases a State may be held responsible for Damage done in its Territory to the Person or Property of Foreigners

The foregoing considerations will be of great help to us in determining the limits of international responsibility in individual cases, without having recourse to obsolete ideas or conceptions based on analogies derived from domestic law.

It is particularly important, in the codification of international law, to steer resolutely clear of all conceptions which would tend to augment the responsibility of States by incorporating in international law principles drawn from dissimilar and even contrary sources.

Such tendencies have prejudiced the cause of international law and have increased rather than reduced the number of international disputes. We must be careful to avoid all exaggeration, as this might constitute a lasting and serious menace to friendly international relations. We must always consider the inter-State will, the only force that can create international law, and must refuse to admit responsibility whenever international opinion is divided or doubtful.

This will certainly be a prudent attitude to adopt, all the more so because States, as at present organised, possess in themselves the necessary means for rendering the protection of foreigners effective.

It is in the light of these observations that we shall now proceed to consider the various circumstances which may cause damage to foreigners and which may or may not involve international responsibility.

#### *Political Crimes committed against Foreigners in the Territory of a State*

Political crime is the most serious case which can arise, since international

law requires a higher form of protection for the foreigner who represents his State officially.

This crime, however, would not in itself constitute a violation of international law. Men, whether they are public officials or not, will always be exposed to the risk of injury and damage. It was obviously not the intention of the international community that the representative character of an individual should render him immune from ordinary misadventure.

Nevertheless, States have undertaken to exercise greater vigilance over these persons than they do over private individuals. They are also bound to take special steps to forestall any assault against the persons of foreign representatives and to display particular energy in pursuing the criminals and ensuring the proper course of justice.

Only if a State neglects these duties, or fails to act with all due diligence and sincerity, will its conduct involve an international responsibility.

This question has already been examined and skilfully settled by a special Committee of Jurists appointed by the Council of the League of Nations on September 28th, 1924.

The question was defined as follows:

> "In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?"

The reply of the Committee of Jurists was:

> "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.
>
> "The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf."

This method of defining the international duty of a State and determining the limits of its responsibility is entirely in keeping with the criterion which we suggested in Part I of this report. It has never been the intention of States themselves to guarantee the inviolability of individual rights or to assume responsibilities which belong to others. They have simply undertaken to make such domestic arrangements as will ensure that foreigners shall find in their territory the relative security afforded by good internal organisation and the existence of appropriate organs for the repression and judgment of crime.

This limitation of the obligation, and of the consequent responsibility, should impel the State which has suffered as a result of the crime to adopt an extremely prudent attitude towards the State in which the crime was committed or attempted. Responsibility cannot be established until a full enquiry has been conducted into the facts of the case. Therefore, as regards political crimes committed against strangers, we propose the adoption of the text which was given above.

*Illegal Acts of Officials*

We have said that officials, to whatever branch of the national administration they may belong, are organs of the State and their acts are consequently to be regarded as acts of the State.

It is indeed through its officials that the State exercises protection. The obligation to provide officials has not been contracted in so definite a form as we have stated it, since international law has created the duty without laying down rules for its application. But, since the State is an abstract entity, it must, in order to find expression, provide itself with organs wherewith to exercise its powers.

Again, though it is perfectly true that the State is not bound to possess any specified organ, it is none the less under an obligation to set up all the organs which it requires to fulfil its international duties.

The first question which now arises is whether all acts of officials should be regarded as acts of the State. Our answer is in the negative, and we draw a distinction between acts accomplished by officials within the limits of their competence and acts which go beyond these limits.

The former are truly acts of the State and, if they are contrary to international law and adversely affect the rights of another State, they must certainly involve the responsibility of the State to which they can definitely and indisputably be ascribed. If, in these circumstances, a foreigner suffers damage, it is for the State to make compensation for such damage.

The reason for this is clear. When the official acts within the limits of his competence, he is obeying a command of the State. If such command infringes a rule of international law, the State must be responsible, since the infringement must arise from the command being wrongful, either as going beyond the rights of the State or as failing to satisfy a duty owed by the State.

In either case, the act of the official, though lawful from the point of view of domestic law, is an illegal act on the part of the State.

In order, however, for the responsibility of a State to be really involved because a foreigner had suffered damage through the fault of an official, and for the State of which the foreigner is a national to be entitled to consider itself wronged and to claim reparation, certain conditions must be fulfilled. These conditions are as follows: (1) the act accomplished by the official within the scope of his official powers must be contrary to an international duty; (2) the duty violated must be a legal and not merely a moral duty; (3) the right invoked by the injured State the violation of which has involved the damage must be a positive right created by treaty between the two States or by customary law duly recognised as emanating from the collective will of States; and (4) the damage must not be the result of an act accomplished by the official in defending the rights of the State.

When these basic conditions have been fulfilled, the international responsibility becomes clearly established and the State cannot plead the inade-

quacy of its laws. It has, indeed, incurred responsibility precisely because it has not foreseen the need of adequate legislation to enable it to fulfil its international duties. That is the main reason for the publication of treaties. By their publication treaties become laws which officials are bound to know and observe.

*If the act of the official is accomplished outside the scope of his competence,* that is to say, if he has exceeded his powers, we are then confronted with an act which, juridically speaking, is not an act of the State. It may be illegal, but, from the point of view of international law, the offence cannot be imputed to the State.

Those who seek to render States responsible for such acts are obliged to fall back on theories which are often ingenious but which have no place in international law. We may quote, for instance, the theory of *culpa in eligendo* or *in custodiendo.* This theory, like all the other faulty theories, is based on a *presumptio juris et de jure,* which cannot be applied in international law.

Moreover, is any State so perfectly organised that it can be certain of never making an error in choosing its officials or supervising their acts? Can it even be stated that a man will always conscientiously fulfil his duties and be incapable of ever committing a wrongful act?

Some persons assert that the existence of this responsibility is supported by the numerous precedents to be found in the past history of international claims. It would be extremely dangerous to attribute any value to these precedents. Positive international law cannot derive its strength from sources which are so exiguous and so conflicting.

A practice which is based on the use of force cannot be described as international practice in the sense admitted by international law. On the contrary, for the sake of the law's prestige, we should be careful to include in customary law only that which undeniably represents the definite will of all States composing the international community.

It would be inconceivable that States should, in their anxiety to protect foreigners, go so far as to guarantee these foreigners against all abuse of power on the part of the authorities and substitute international responsibility for individual responsibility.

Just as the act of the official, accomplished within the limit of his competence, is, from the point of view of international law, an act of the State, because it constitutes an application of the national law—no matter whether such law be perfect or faulty—so an irregularity on the part of an official is an individual act, which is not willed by the State and may even be the result of malice on the part of the official.

Although such cases should not be regarded as coming within the scope of international law, the State is nevertheless bound to proceed in such a way as to obviate their occurrence as far as possible, and to enable the foreigner who has been wronged to take action against the offender.

We shall therefore place these cases in a higher category than unlawful

acts committed by individuals who are not officials. Acts of private persons and acts of officials who exceed their powers are alike private acts, but we consider that the vigilance exercised by the State should be more strict in the latter case.

Thus, with regard to acts of officials, international responsibility arises if a Government, being informed that an official is about to commit an unlawful act against a national of a foreign State, does not take timely steps to prevent it; or if, when the act has been committed, the Government does not hasten to visit the official in question with condign punishment under the national legislation; or, again, if it fails to give effect to the proceedings which the injured foreigner is entitled to bring in conformity with the State's legislation.

Apart from these circumstances, a State cannot be held responsible under international law.

*Acts of Private Persons*

It is in this connection, more especially, that a mass of theory has been evolved with a view to proving that a State is internationally responsible for the acts of individuals subject to its jurisdiction. None of these theories will bear careful scrutiny.

In the first place, an attempt has been made to resuscitate a mediæval conception under which the body politic was held to be responsible for the acts of its members. This conception, which may have been of some service when all power was concentrated in the hands of sovereigns, would be utterly inapt in the present position of the relations between the State and the individuals under its jurisdiction.

Grotius took a step in the right direction by opposing to this theory the Roman conception of *culpa*, but his view was still far from meeting the requirements of international law and defining the true function of modern States in their international relations.

At the present time, the postulate that the State is not responsible for the acts of others has become a basic legal rule: indeed, if it were not so, the very foundations of the community would be shaken.

The sovereigns, who were formerly identified with the State, are no longer absolute masters of everything within their territory. The individual as well as the sovereign has a sphere of action proper to himself. He has full liberty of action and is responsible for his acts. The relation of one State to other States is the same as that of the individual to the State in which he resides. If one private person, be he national or foreigner, causes injury or wrong to another private person, be he national or foreigner, his act, being unlawful from the point of view of domestic law, entitles the injured party to take legal action in conformity with the law of the country.

We do not think it necessary to dwell at any length on this subject, as its importance, from the point of view of international law, is slight. Should any doubt arise concerning wrongs due to the acts of private persons, it will

be sufficient to refer to our definition of the violation of international law and the nature and limits of the responsibility of States in their mutual relations.

*Acts performed in the Exercise of Judicial Functions*

If there is one general principle concerning which there can be no discussion, it is respect for the majesty of the law. As between self-respecting States, there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.

There are certain other principles as unquestioned and as widely observed as the above. For instance, the principle that all interference or claim to interfere with the regular course of justice in another State is tantamount to attack on that State's internal sovereignty.

Here we have certain legal standards, as categorical as they are precise, created by the will of all countries as rules of conduct to be observed in all circumstances of the life of the international community.

As regards the duty of affording judicial protection to foreigners, it is sufficient that they should be granted a legal status, which they can assert through appropriate laws and independent tribunals to which they are allowed access on the same footing as nationals. Neither more nor less.

The decisions of these tribunals must always be regarded as being in conformity with the law. None but a judge of the country is entitled to interpret that country's law. Even if he makes a mistake his judgment must be accepted; the dignity of justice and the character of modern States demand this.

The opinion that a State is not responsible for a judicial error committed by its tribunals is so firmly implanted in the minds of nations that legal publicists in all countries have criticised—and often very harshly criticised—the arbitral award under which De Martens declared the Netherlands to be responsible for the judicial error committed by its courts in the case of the Australian vessel *Costa Rica Packet.*

This is equivalent to stating that the community of nations admits no appeal against judicial errors other than that which the *lex loci* itself may afford to foreigners as well as nationals, and that, if no provision is made for appeal, both parties must acquiesce and cannot claim to invoke any responsibility at all on the part of the State in which the case was heard.

The same principle must apply to sentences which have been termed "*unjust*" or "*manifestly unjust.*"

Nothing could be more dangerous than to admit the possibility of rehearing, elsewhere than in the courts of the country, a judicial decision alleged to be contrary to justice. An opening would thus be afforded for abuses of every kind, for the most serious violations of internal sovereignty and for countless international conflicts.

As States are at present organised, each being bound to respect the institutions of the others, any endeavour to create, at a given moment, a special

court having power to overrule the national judicature would be unthinkable.

Unless we are ready to overset the one true basis of international law—the collective will of States—we will not entertain the supposition that States, when they entered the community, ever contemplated an abridgment of the dignity and authority of their own courts of law. That, however, would be the final result of rehearing a case where no provision for appeal existed under the legislation of the State concerned; and yet the advocates of the theory of international responsibility, in connection with judicial decisions vitiated by *manifest or flagrant injustice*, would inevitably be led to provide for some such rehearing.

Where would they find a *super-judge* competent to determine the existence of such injustice? And, supposing that they could discover such a personality, what would become of the principle of the equality of States, a principle on which the international community is based, and which cannot be disregarded without shaking the whole edifice to its foundations?

Moreover, to admit the possibility of international proceedings being brought in another country, in opposition to the original *lex loci*, would be contrary to the international rule under which nationals of a foreign State cannot claim more favourable treatment than nationals. This would, however, be the result if foreigners had an international appeal open to them in addition to the remedies offered by the national law.

We should not continue this reasoning any further had not a number of modern legal publicists unfortunately come forward in favour of this view of international responsibility. We must therefore persist in our argument, and we shall substantiate our contention—that no international recourse is admissible against municipal judgments—by quoting certain cases. These cases demonstrate the repugnance with which requests for intervention on these lines have almost invariably been received.

In 1885, when the Government of the United States of America received a request of this kind, the Secretary of State, Mr. Bayard, sent a letter to the American Minister in Mexico in which he said: "This Department is not a tribunal for the rehearing of decisions of foreign courts, and we have always laid down that errors of law and even of fact, committed by these tribunals, do not afford a motive for any intervention on our part."

Another American Secretary of State, Mr. Marcy, adopted a similar line in writing to the United States Minister in Chile, Mr. Starkéatter: "Irregularities committed in the case of an American citizen in Chile, unless they amount to a *refusal of justice*, affords no grounds for intervention by the United States."

When Great Britain and Portugal submitted to arbitration the question of the alleged *manifest injustice* of a decision given by the Corte de Relãcao, the arbitration tribunal stated: "While we unhesitatingly admit that the decision was erroneous, we cannot agree that it was manifestly unjust. It would be manifestly unjust to hold the Portuguese Government to account for faults

imputable to the courts of that country. According to the Portuguese constitution, these courts are absolutely independent of the Government and therefore the Government can exert no influence over their decisions. The British Government cannot disregard this fact without at the same time disregarding the whole existence of Portugal as a civilised State, and that is obviously not the intention of the British Government."

As these views were expressed in cases in which the party concerned happened to be a small State, we can well imagine the reception which a great Power would accord to a claim to hold it responsible for an unjust decision given by its magistrates.

In every State the independence of the judicature and respect for the law are recognised as such fundamental principles that even when the courts are called upon to apply the rules of private international law, which, as a result of an international treaty, fall within the scope of the State's own laws, they are not made a subject in doing so to the supervision of their Government (resolution of the Institute of International Law at its session at The Hague in 1875).

Another theory which is quite as inadmissible is that international responsibility is incurred through abnormal delay in the administration of justice.

No State can claim to possess courts so efficient that they never exceed the time-limit laid down in the laws of procedure. The larger the State, the greater the number of cases brought before its judges, and consequently the greater the difficulty of avoiding delays, sometimes quite considerable delays.

If we agree that the State is responsible neither for judicial errors nor for the manifest injustice of judicial decisions, nor for abnormal delay in the administration of justice, are we to infer from this that the State has no responsibilities in regard to the manner in which it dispenses justice? Certainly not. Its international responsibility may become seriously involved.

We have already shown that the State owes protection to the nationals of foreign States within its territory, and must accord such protection by granting foreigners the necessary means for defending their rights. But these means can only be such as are made available by the laws and courts of the country and by the authorities responsible for public order and security.

In the case in question the State would not be fulfilling its duty towards other States if it did not allow foreigners to have access to its courts on the same terms as its own nationals, or if these courts refused to proceed with an action brought by a foreigner in defence of the rights which are granted to him and through the means of recourse which are provided under the domestic laws.

Such responsibility would arise as the result of *a denial of justice*.

In saying "on the same terms as its own nationals," we desired to emphasise the necessity of equality as regards access to the means of recourse open to all persons under the same jurisdiction. Thus, if the nationals of a State

are allowed to appeal from the decision of a court of first instance, the same privilege must be accorded to foreigners when their recognised rights are in dispute.

The decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be regarded as a *denial of justice*. The State has fulfilled its duty by the very fact that the local tribunal has been able to give a decision regarding this request.

*Denial of justice* is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access.

In conclusion, therefore, we infer that a State, in so far as it is bound to afford judicial protection, incurs international responsibility only if it has been guilty of a *denial of justice*, as defined above.

*Damage caused to Foreigners in Cases of Riot and Civil War*

This problem has long been a source of disputes of every kind, and discussions which have not yet led to the enunciation of any definite rule. This is not due to the absence of international juridical standards by which the problem might be solved, but rather to a habit, which certain exponents of international law have acquired, of straying into fields where no enquiry on the lines of international law can be usefully carried out, and then evolving a series of quite unwarrantable conclusions, by means of analogies which are incompatible with that law.

Some authorities, in their desire to attain these results, have not hesitated to delve into the remote past, and to explore both the individualist and collective conceptions of law.

When these theories have crumbled away in the light of careful research, other theories have been advanced to replace them—new indeed, but equally futile.

The latest of these were expounded during the discussion of the regulations drawn up at Neuchâtel by the Institute of International Law, namely, the theories of *expropriation* and *State risk* (*risque étatif*).

We will examine these theories briefly, but will not of course approach the question from the same standpoint as their authors. Our sole concern is to discover rules of international law capable of being codified; we cannot therefore allow ourselves to wander deliberately further and further away from international law in the search for some basis of international responsibility.

Brusa has done so, and has openly avowed it. In his report to the Institute of International Law he states that foreign diplomatic intervention should be limited to cases in which justice is not accorded to a foreigner who has suffered damage in time of riot or revolution, or in which the Govern-

ment has violated the law of nations, in particular (he observes) by violating a treaty under which foreign residents are exempted from forced loans and contributions.

"In this case," adds Brusa, "in addition to the correlative duty of affording compensation for the services rendered and returning the property received, the State has, it would seem, at the same time actually incurred responsibility towards the foreign State under the law of nations, and has thus afforded ground for direct diplomatic intervention."

Unless we are mistaken, the logical outcome of Brusa's idea is that:

1. The obligation to compensate for damage arises from the fact that the State has received services.
2. The responsibility of the State only becomes of an international character when the State violates the law of nations by the *denial of justice* or the violation of a treaty.

This would prove that the "responsibility" arising out of Brusa's arguments is purely civil.

In correlation with his theory of compensation for benefits received by the State (and as if he purposely desired to break away from international law), he advances simultaneously his other theory of *expropriation* in civil matters.

What would become of international law if rules deriving from private law were thus transferred to its sphere on the sole ground of some sort of analogy? And is there really any such analogy between the relations of States *inter se* and the relations between a State and individuals; between the international community and the national community? In the first place, there can be no juridical analogy between two bodies of law which are different as to their source, their content and their validity. International law and private law have been created, and are moved, by two separate forces, which have absolutely no kinship with one another. For the first, although it is superior, the concourse of many wills is required; the latter is subject to no such limitative necessity.

According to this principle, therefore, international law must keep itself pure from any infiltration of domestic law.

Neither in the theories of Brusa, nor in the application of the idea of *risk* (*risque*) proposed by Fauchille on the same occasion, do we perceive any principles of private law which could be converted into principles of international law. It is therefore juridically impossible to draw any conclusions therefrom, even of a provisional nature.

In short, it is idle to assert that the elements required to establish international responsibility can be found in civil law or in the ideals applicable to civil law.

Apart from the fundamental difficulty which we have pointed out, these two theories are open to other criticisms. The theory of *expropriation*, for instance, ceases to be accurate when it places all loss that a foreigner may

suffer in the case of revolution on the same footing as the loss of property for reasons of public utility. In the latter case we have a rendering of services which constitutes an undoubted title to compensation, however the question may have arisen; whereas, in other acts which may involve loss, we do not perceive a similar rendering of material services.

The theory of *State risk* (*risque étatif*) tends to introduce into international law economic conceptions which are out of place in international relations. The arguments by which it has been sought to bring these conceptions into the sphere of international law neither enhance their value nor justify their admission. "Foreigners," said Fauchille, "who come to take up their residence in a country constitute, like nationals, a source of gain for the State in which they reside: their industry and their sojourn in the territory bring profit to the State. Is it not logical and just that, in return, the State should be bound to give compensation for loss which these persons—be they nationals or foreigners—may have suffered at the hands of other nationals or other foreigners?"

Would it not be more logical to reverse the argument and say: Foreigners do not leave their homeland in order to be of profit to the State in which they take up their residence. On the contrary, they come to the country with the definite intention of availing themselves of its wealth, its hospitality and its institutions, hoping to carve out for themselves a better position than that which they have left behind them. Their change of residence being voluntary, they must accept all the risks of chance happenings and unforeseen events.

In this survey we should also reject all theories which base the responsibility of the State, in case of riot or revolution, on a *presumptio juris et de jure* or an *obligatio ex delicto*.

International law itself provides the basis for the solution of this question.

A *riot* is an act committed by private individuals, and not by the State. No loss occasioned to foreigners by a riot involves international responsibility unless the State has neglected to fulfil its duties of exercising vigilance, repressing disorder and providing judicial protection.

Damage caused by revolution may be the result of acts committed by either of the opposing parties. If the acts are committed by the lawful authorities, whose concern it is to restore order, the State is not responsible for the fact that, in exercising its supreme right and duty, it has caused damage to foreigners, since the interests of the community, of which foreigners as well as nationals form part, are higher than any private interests. The State, by taking steps to restore the well-being of the community, has simply acted as an entity which is bound, both from a national and an international standpoint, to maintain order and security. The former duty arises under the constitution, and the latter under the obligation which the State has contracted to ensure normal conditions of life for foreigners, and these conditions can only be secured if order and peace prevail. Although

the claim of absolute irresponsibility may just conceivably be open to question when a State is exercising a right, it cannot possibly be questioned when the State is simultaneously exercising a right and discharging an international duty.

We do not share the opinion of those who deny that revolution is a case of *vis major*. In general, neither wars nor revolutions are desired by the State —the latter, indeed, even less so than the former. They almost invariably occur because some blind force, against which the public authorities are powerless, has been set in motion. No State is immune from the evil. Revolution bursts upon a country with all the brutal force of some convulsion of nature. Foreigners as well as nationals have to partake of the consequences and share in the good or evil fortune which these undesired and unforeseen events may bring.

If it could be sustained that the protective rôle of a State renders it indisputably liable to grant compensation for all losses suffered by foreigners, we could not overlook the question of compensation for losses caused to foreigners by strikes. In this case the responsibility of the State would be even more directly involved, since, in almost all countries, the State recognises the right to strike, or at any rate tolerates strikes. It should not be forgotten that in the intensive modern life of great cities a strike may cause greater loss to foreigners and nationals than that occasioned by minor revolutions, which have often formed a pretext for inordinate claims.

Loss occasioned by the acts of rebels or revolutionaries comes within the category of acts done by private individuals and therefore not imputable to the State. In this connection we should remember the rule that the duty of protection is confined to the territory over which the State exercises its sovereignty.

A State cannot be held responsible for occurrences in a territory no longer under its authority or control, when a case of *vis major* prevents it from fulfilling its duties as protector.

Let us now refer to customary law in order to ascertain whether there is any rule which may be regarded as an expression of inter-State will in the matter of losses suffered by foreigners in civil wars.

Customary law demonstrates with mathematical exactitude that States, wherever situated, have on all occasions absolutely rejected all international responsibility for such losses.

Powerful States have invariably asserted this rejection of responsibility in terms so clear and precise that no doubt can exist as to their very definite views on the subject. Weaker States, when they have not been able to resist external pressure, have indeed paid indemnities, but always subject to the reservation that they were not bound at law to pay them, and were simply doing so as an *act of grace*.

We will quote a few instances of States which, on various occasions, have

pleaded the nonexistence of international responsibility: Belgium, in 1830 and 1834; France, in 1830, 1848 and 1871; Russia, in 1850; Austria, in 1865; the United States of America during the War of Secession and in 1851, when a number of Spaniards were victims of the populace of New Orleans; and also all the States of Latin America.

Treaties concluded between certain European States, and between several of the American States, which contain provisions disclaiming responsibility in case of damage occasioned by revolt and civil war, have often been the subject of criticism. We think that these criticisms ought rather to be levelled against the nations which, in defiance of all international rules, have sought to impose on other States a responsibility which the latter could never really have incurred. The States of Latin America have acted wisely in endeavouring to secure protection for their legitimate rights by means of treaty provisions.

It should be noted, moreover, that these treaties are careful not to exclude responsibility arising from *a denial of justice*.

In short, if international law is to be codified—as it certainly should be—in accordance with the will of States, as manifested either by treaties or by international practice, we must conclude that the State is not responsible for loss suffered by foreigners in cases of riot or revolution.

We do not, however, include in this category loss of property sustained by foreigners through the action of the State as a result of requisition, expropriation, confiscation, spoliation or on any other arbitrary proceedings. Whether in peace, in war or in time of revolution, the State should be foremost in respecting and protecting the property of foreigners.

We have said that property, with life and liberty, forms part of the fundamental rights of the individual and that these rights must be recognised and protected wherever the individual happens to be. A state of war or revolution would in no way justify the violation of any of these rights, and a State failing in the duty, which it has contracted with regard to the international community, to afford safety and protection would also incur international responsibility.

The State is therefore bound to grant compensation for the property of foreigners which it has appropriated in time of revolution.

As regards the property of foreigners seized by revolutionaries or rebels—an act which, as we have pointed out, falls within the category of acts committed by private individuals—the State must provide such foreigners with all facilities for prosecuting the offenders and recovering possession of their property. If, on the contrary, the State were to deprive these foreigners of all means of action, by passing a law of amnesty, its international responsibility would be involved and it would be answerable for any damage which the revolutionaries or rebels might have caused to the foreigners in question.

## V

### *Second Question*

### WHETHER AND, IF SO, IN WHAT TERMS IT WILL BE POSSIBLE TO FRAME AN INTERNATIONAL CONVENTION WHEREBY FACTS WHICH MIGHT INVOLVE THE RESPONSIBILITY OF STATES COULD BE ESTABLISHED, AND PROHIBITING IN SUCH CASES RECOURSE TO MEASURES OF COERCION UNTIL ALL POSSIBLE MEANS OF PACIFIC SETTLEMENT HAVE BEEN EXHAUSTED

We have shown that international responsibility does not arise by reason of any loss which foreigners may sustain but by reason of a failure to act, or the commission of an act, contrary to international law and imputable to the State. Although in some cases responsibility clearly results from the existence or non-existence of a fact, it is often—we might say almost always—necessary to conduct a careful enquiry into the facts in order to ascertain whether they really give rise to a question of international law and whether the State has incurred responsibility.

At present, the best international method for conducting such enquiries is that of international commissions of enquiry.

Let us summarise the advantages of these commissions:

1. The time which elapses between the committing of the acts and the constitution of the commissions undoubtedly helps to abate the excitement and passions aroused;

2. The nationality of the persons appointed to conduct the enquiry, their standing and the moral responsibility which rests upon them afford a guarantee of the impartiality of their investigations;

3. Since the conclusions of these commissions do not take the form of an arbitral award, the conflict may be eliminated by the mere acceptance of these conclusions, without any judgment, which might wound the susceptibilities of the responsible State, having been pronounced;

4. Should the conclusions produce no immediate result, the dispute may still be settled by other pacific methods.

In most cases the enquiry may be expected to end the dispute without creating any abiding bitterness between the two States concerned. Neither party has reason to regard itself as victor or vanquished; neither has had to bow to the peremptory dictates of a judicial sentence. The commission merely submits its report and the parties concerned are free to draw their conclusions therefrom and to order their actions accordingly.

We should not forget the immense service which was rendered to the cause of peace by this method of conciliation in the Dogger Bank affair between Russia and Great Britain. Never has a question of damage caused to foreigners brought two great Powers so near to the brink of war as in 1904, when the Russian fleet on its way to the Far East bombarded a British fishing fleet on the Dogger Bank.

War was only avoided by having recourse to one of the international commissions of enquiry provided for in the Hague Convention of 1899.

The first result of this procedure was to allay the justifiable indignation which had been aroused in England and which was gathering volume as the discussion between the Russian and British Governments continued.

The commission was composed of five members, one being chosen by the Government of each of the nations concerned, two others by the French and American Governments, and the fifth by these four members sitting together. Four months later it submitted a report, stating, amongst other conclusions, that the British fishing fleet had not committed any hostile act and that, as there was no torpedo-craft among the trawlers or in the vicinity, the Russian Admiral Rojestvensky had not been justified in opening fire.

In view of this very conclusive statement, the Russian Government, without further procedure or action, paid the British Government an indemnity for the victims and the incident was definitely closed.

Treaties, with a compulsory clause, concerning international commissions of enquiry, have already been concluded between several States, in particular between France and the United States, between the United States and a number of Latin-American States, between the Central American Republics and between Argentina, Brazil and Chile.

Consequently, we propose that an international convention should be drawn up under which the signatory States would bind themselves to entrust to international commissions of enquiry the investigation of the facts which may have given rise to an incident, involving international responsibility, where it has been impossible to settle such incident by ordinary methods.

Whenever a dispute should arise the parties concerned would be entitled to demand the appointment of a commission of enquiry.

The Permanent Court of International Justice might be chosen to act as an intermediary organ between the States parties to the dispute. On receiving a request, the Court would invite each of the States concerned to appoint a commissioner and would at the same time request two Governments, selected by itself, to appoint two other commissioners each. The Court would fix the date and place at which the four members should meet to elect the fifth commissioner—who would be Chairman of the Commission—and to begin the enquiry.

The procedure to be followed and the powers of the commission might also be defined in this Convention.

Further, and most important of all, there would be a clause by which the States would undertake not to commit any act of violence either before or after the formation of the commission of enquiry, and to provide the latter body with all necessary facilities for carrying out its task.

The commission should also have the power to order measures for safeguarding the rights of each of the parties concerned until the commission has submitted its report.

The report and all decisions and conclusions of the commission would have to be agreed to and drawn up by a majority vote.

The report should merely establish the facts, without taking the form of an award, leaving the parties free to act as they think best on the conclusions of the commission of enquiry. As a corollary to the undertaking concerning the appointment of commissions of enquiry, States should also bind themselves, in the same convention, to submit to the arbitration of the Permanent Court of International Justice any dispute not definitely closed by the report of the commission of enquiry.

The convention might also—and this would be even more advantageous—lay down that permanent commissioners should be appointed for a fixed period from lists of names which each contracting State would send to the Permanent Court of International Justice. When a case arose an international commission of enquiry would be immediately formed consisting of five commissioners, one appointed by each of the States concerned in the dispute, two other commissioners of other nationalities elected by the Court, and finally a fifth commissioner appointed by the four others.

Should a dispute arise, whatever the nature or form of that dispute might be, States would undertake to abstain from all coercive measures.

This method of acting as judge in one's own cause has indeed become incompatible with the organisation of modern international society. To resort to coercion would be tantamount to returning to primitive times when reparation was exacted by force.

The shock caused to the conscience of the world whenever coercive measures are employed in peace-time is sufficient to prove that the case of violence is no longer admitted in the present state of modern civilisation.

The international community as represented at Geneva in 1924 condemned acts of force and violence and placed them on a level with the crime of aggression in the Protocol on Arbitration, Security and Disarmament, which it drew up and which, when all is said and done, will remain the finest effort ever made in human history to ensure world peace. The official comment on Article 10, which determines the aggressor, reads as follows: "The text refers to resort to war, but it was understood during the discussion that, while mention was made of the most serious and striking instance, it was in accordance with the spirit of the Protocol that acts of violence and force, which possibly may not constitute an actual state of war, should nevertheless be taken into consideration by the Council." This official comment was unanimously approved by the 1924 Assembly.

## VI

### *Conclusions*[1]

The conclusions we are about to draw are the logical outcome of the

[1] As reproduced here, the conclusions of the report contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts.

principles by which we have consistently been guided in preparing this report—and which we hold to be the only possible basis for the elaboration of rules likely to secure the approval of all States.

Were we to depart from these guiding rules, were we to seek to codify principles regarding which the collective will is uncertain or actually divided, our endeavours would be useless; indeed, we should be encouraging the establishment of a series of continental systems and codifications of law—which already exist in outline—the sole result being to create unending sources of disagreement.

We should not lose sight of the fact that the object of our task is to establish rules which may be embodied in international conventions, and that these conventions, to be effective, require the consent of all, or nearly all, the countries of the world.

These are our conclusions:

1. Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognised by customary law in a clear and definite form.

2. The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognised public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.

3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:

(*a*) If the right which has been infringed and which is recognised as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;

(*b*) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;

The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.

4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an

official acting outside his competence as defined by the national laws, except in the following cases:

(*a*) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(*b*) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

(*c*) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws.

5. Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State.

6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

It therefore follows:

(*a*) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;

(*b*) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice.*

*Denial of justice* consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice.*

8. Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.

9. The category of damage referred to in the preceding paragraph does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal

means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.

The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation.

10. All that has been said in regard to centralised States applies equally to federal States. Consequently, any international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous.

11. Any dispute which may arise between two States regarding damage suffered by foreigners within the territory of one of the States must be submitted to an international commission of enquiry appointed to examine the facts.

If the report of the commissioners adopted by a majority vote does not result in the incident being closed, the parties concerned must submit the dispute to decision by arbitration or some other means of pacific settlement.

12. States must formally undertake not to resort in the future to any measure of coercion until all the above-mentioned means have been exhausted.

(*Signed*) Gustavo GUERRERO,
*Rapporteur.*

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 5

*adopted by the Committee at its Second Session, held in January 1926*

# PROCEDURE OF INTERNATIONAL CONFERENCES AND PROCEDURE FOR THE CONCLUSION AND DRAFTING OF TREATIES

The Committee has the following terms of reference: [1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether it is possible to formulate rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee consisting of M. MASTNY, as Rapporteur, and M. RUNDSTEIN. The report comprises a report presented by M. Mastny and observations thereon by M. Rundstein.

The nature of the general question and of the particular questions involved therein appears from the report. There is no question of attempting to reach by way of international agreement a body of rules which would be binding obligatorily upon the various States. The object of the suggested investigation is more modest. It would be sought to put at the disposal of the States concerned rules which could be modified as they chose in each concrete case but whose existence might save them much discussion, doubt and delay.

It is in this spirit that the Committee ventures to submit, with the report, two attached lists [2] indicating possible subjects for regulation, lists modified in some respects by the Rapporteur in consequence of the discussion in the

[1] See Assembly Resolution of September 22nd, 1924.

[2] See pages 219 and 220.

Committee but continuing, in the view both of the Committee and of the Rapporteur, to have the character of questionnaires. It is also understood that, at the present stage of its work, the Committee does not pronounce either for or against the opinions expressed on various points in the report.

The Committee has felt that it should not limit itself to raising the general question. It has wished, by referring to the report and to the lists, to call attention to a number of details with a view to facilitating the decision as to whether regulation by international agreement is desirable and realisable.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

ANNEX

## REPORT OF THE SUB-COMMITTEE

M. MASTNY, *Rapporteur.*
M. RUNDSTEIN.

***Whether it is possible to formulate rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be.***

### I. REPORT SUBMITTED BY M. MASTNY

[*Translation.*]

At its first session held at Geneva (meeting of April 8th, 1925), the Committee of Experts for the Progressive Codification of International Law adopted, among others, the following resolution:

> "(*g*) The Committee appoints a Sub-Committee to examine the possibility of formulating rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be."

The undersigned, having had the honour to be appointed Rapporteur of the Sub-Committee, got into touch with M. Rundstein, the other member of the Sub-Committee, and explained to him his general ideas on the subject and on the method of work the Sub-Committee should adopt.

After an exchange of views, the two members of the Sub-Committee have come to the conclusion that the matter indicated in the resolution is suitable, subject to certain reservations, for regulation by convention, *i.e.*, for codi-

fication in the broad sense of the term accepted by the Committee of Experts at its first session.

The desire to formulate certain rules applicable to the procedure of international conferences has often been observed in practice and has also found expression in theoretical writings (see, for example, L. OPPENHEIM, *Die Zukunft des Völkerrechtes*, Leipzig, 1911, page 23).

The writers on international law who deal with the special questions connected with the negotiation of treaties in most cases confine themselves to explaining in greater or less detail the ordinary organisation and procedure of conferences, and draw attention to disputed points, or give an historical account of past congresses and conferences (see P. PRADIER-FODÉRÉ, *Cours de droit diplomatique*, 1899, Vol. II, pages 297 *et seq.*; E. SATOW, *A Guide to Diplomatic Practice*, 1922, Vol. II; and R. GILADY-GRUBER, *Internationale Staatenkongresse und Konferenzen*, 1919).

Ludwig BITTNER, in his excellent book *Die Lehre von den völkerrechtlichen Vertragsurkunden*, dealing with the form in which treaties are negotiated and concluded, expresses doubts as to the possibility of systematically regulating procedure owing to the many different kinds of international conferences (political conferences, conferences for legislation by way of conventions, administrative conferences, etc.) and the endless combinations of the different types which, in his opinion, preclude any possibility of uniform regulation (BITTNER, page 104).

While admitting the difficulty of the problem, the Rapporteur is unable to accept this view in its entirety; he is convinced of the possibility of drawing up certain rules both for the procedure and the organisation of international conferences, provided that these rules are sufficiently general to allow States and their representatives the requisite freedom in settling the details in each case according to circumstances and with due regard to the special requirements which may arise in practice.

The success of such rules would depend on the method employed in establishing them.

As it stands, the text of Resolution (*g*) would authorise the Sub-Committee to submit a preliminary draft of such regulations forthwith.

An attempt to settle the problem in this way at the outset would seem, however, to be premature, in the first place for purely formal reasons.

The resolution adopted by the Assembly of the League of Nations on September 22nd, 1924, which set up the Committee of Experts on International Law, provides for the execution of the work of codification in three stages.

In the first stage the Committee has merely to prepare "a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment."

In the Rapporteur's opinion, it is only during the third stage that the final

results of the work should be submitted, after the replies of the Governments and learned societies have been studied and discussed.

This view was also expressed in the resolution of the Committee of Experts (meeting of April 8th, 1925) which, in entrusting the Sub-Committees with the study of certain questions, observed that "the Committee has not at present gone beyond the preliminary examination of the fields to be investigated with a view to later elaboration of detailed proposals."

But, apart from these purely formal reasons, there are others which necessitate caution and justify the Sub-Committee in confining its report to a general statement of methods and to indicating their character.

The technique of the organisation and procedure of international conferences has developed gradually since the seventeenth century (the first foundations were laid by the Congress of Westphalia and the Congress of Vienna).

The procedure of present-day conferences has been based, in the case of political conferences, on the Berlin Congress of 1878; in the case of conferences relating to the codification of law, on the two Hague Conferences of 1899 and 1907; and in the case of administrative conferences, on the conferences of the International Unions (postal, telegraphic, etc.) and their international bureaux.

As regards more especially the preparatory procedure (preliminaries, preparation of the subject, invitations and convocation, it is the London Maritime Conference of 1908–09 which serves as model.

A certain number of practices have grown up and these reappear at each conference and are handed on from one to the other.

Sometimes the rules *in concreto* are supplemented as to detail to meet special requirements which arise in practice, and sometimes the rules of procedure, particularly those of the meetings themselves, are simplified.

The process of evolution reached its culminating point in the proceedings of the Peace Conferences at Paris and in the activities of the League of Nations and its Secretariat. The latter has rendered immense services in connection with the problem with which we are dealing by working out all the details involved by the complexity of the international life of to-day.

The process of evolution has not yet ceased, however. To realise this, it is sufficient to study the history of recent conferences and to observe that the procedure, while in general following established precedent, has been modified in detail by the application of special provisions *in concreto*.

One of the objections urged against the codification of international law is that it is a serious drawback to give fixed contractual form to principles in process of evolution. The work of codification, however, is open to no such objection as far as the procedure of conferences is concerned provided that:

(*a*) Codification is confined to the formulation of *subsidiary* rules of procedure (in the event of States not deciding to establish special rules);

(*b*) Codification only gives concrete expression to principles generally recognised as forming part of the customary law.

* * *

The rules which usually govern the procedure of international conferences may be divided into two categories.

1. The first category includes a series of rules which are left to the free choice of the States and their representatives taking part in the conference.

As regards this category it is impossible to say that a custom exists in the legal sense of the term, as the rules are purely formal and can constantly be changed at the discretion of the participating States.

This category of rules is based on usage followed without "*opinio necessitatis.*"

2. The second category, on the other hand, includes certain rules which from the legal point of view are merely the application of certain fundamental principles generally recognised as forming part of existing international law (customary law, "*opinio necessitatis*").

It is in particular the questions coming within this second category which, having their origin in international customary law (substantive law), are not always interpreted and applied in the same way and offer difficulties which often hamper the smooth running of international conferences.

Even a superficial discussion of the various questions in dispute from the point of view of practical application to international conferences would go far beyond the scope of a report the only purpose of which, at the present stage, is to demonstrate whether codification is possible and desirable.

Clearly, the codification of rules the terms of which depend on the previous solution of a controversial question would in principle present greater difficulties than a simple codification of customs and practices which are universally admitted and uniformly interpreted.

The utility of codification is therefore not always in proportion to its practicability.

The Rapporteur, for his part, has no hesitation, however, in pronouncing in favour of a codification extending even to controversial questions, and he believes that a codification of this kind in the wide sense of the term would render the greatest service to international relations in connection with conferences.

It is true that the subject-matter specified in Resolution (*g*) appears by its very nature to imply that the work of codification should be confined to questions relating purely to form. It follows that the discussion of questions of substantive law should be limited to problems which are directly connected with questions of form.

Apart from this, codification must necessarily avoid trespassing on the domain of politics, which nevertheless often has an influence on the provisions *in concreto*.

At the same time it should adopt formulas sufficiently wide to allow of any special measures being taken which may be required in particular cases.

* * *

To answer the question "what such rules should be", it is necessary first of all to decide on what basis regulation should be established.

Three solutions suggest themselves:

(1) Regulation of procedure containing only rules common to all types of conferences;

(2) Detailed regulation of the procedure of a certain type of conference;

(3) Adoption in a convention of certain general principles which should be observed by States when conferences are held, irrespective of the special nature of such conferences.

*Sub. 1: First Type.*—The Rapporteur considers that such regulations, in endeavouring to provide for every possible combination of the different types of conferences, would have to be of so general a nature that the practical utility of codification would be doubtful.

*Sub. 2: Second Type.*—Objections may be made to detailed regulations applying to certain types of conferences.

Owing to the variety of their objects and aims, no absolute classification of international conferences has been established.

For the purposes of codification, it would perhaps be necessary to establish certain distinctions. In the first place, a distinction might be made between conferences planned and organised by the League of Nations and held under its auspices, and all conferences unconnected with the League.

A further distinction should be made between political conferences and non-political conferences (administrative, economic, social, etc.).

From the legal point of view, a distinction should be made between conferences on international conventional law (codification conferences) and special conferences (conferences settling particular relations between the contracting States).

Lastly, according to the character of the representatives, a distinction should be made between diplomatic conferences (diplomatic agents) and technical conferences (experts).

Which of these types should be considered for the purposes of codification?

As regards conferences held under the auspices of the League of Nations, the Rapporteur considers that, within the sphere of its activities, the Secretariat is the body best qualified to perform the preliminary work and to determine the procedure, while taking into account the special requirements of each particular case. Nevertheless, the practical experience gained at recent conferences shows that even the draft rules of procedure prepared

with the greatest care by the Secretariat have not always been adopted *en bloc*.

As regards political conferences unconnected with the League of Nations, the Rapporteur considers that the variety of objects and aims and the complexity of the questions to be discussed, together with the varying number of States taking part and the character of the representatives in individual cases, etc., do not permit of any uniform or universal type of rules of procedure; and this opinion is borne out by practical experience.

As regards non-political conferences, it should be pointed out that certain periodical conferences (those of the international unions and others) are already provided with rules of procedure adapted to their special needs.

Lastly, the character of diplomatic and technical conferences is so different as to discourage attempts at codification of the kind with which we are now dealing.

If we accept the idea that the organisation of and the regulations for the conferences held under the auspices of the League of Nations should be left in the hands of the Secretariat, the types of conferences for which regulation would be undertaken would be very limited in number and the practical utility of regulating procedure would also be limited, especially as it is obvious that any regulations adopted would only be of a subsidiary character.

*Sub. 3: Third Type.*—If we recognise the objections put forward in 1 and 2, there only remains the third alternative, which contemplates the adoption, by means of conventions, of certain general principles of procedure for all international conferences irrespective of their special character.

Codification in this last sense should be confined:

(*a*) To the generally recognised principles of substantive international law (customary law);

(*b*) To the general rules as regards form consecrated by usage;

(*c*) To the positive rules of conventional legislation with a view to obviating the difficulties to which disputed questions may give rise (conventional law).

* * *

In determining the *scope of the codification* to be undertaken, it would be well to consider the various points enumerated in the following list.

### List of Subjects to be examined

### Procedure of International Conferences

General principles.

Definition of International Conferences.

Classification of International Conferences.

A. *Organisation.*

Qualifications for membership.

Independent States.

Composite States.
States not enjoying complete independence and other formations.
Right of representation.
States concerned.
Admission of third Powers.
Rights of members taking part.
System of representation.
Delegations.
Questions of competence.
(*a*) Plenipotentiary delegates. Principal representatives. Assistant delegates.
Substitute representatives.
Secretaries of delegations.
Experts.
Technical assistants.
Auxiliary staff.
(*b*) Observers.
Diplomatic privileges and immunities.

B. *Preparatory Procedure.*

Preliminary conventions.
Initiative, invitation, convocation.
Previous agreement on the subjects of the conference.
Choice of place and date.
Preparation of the subject-matter and drafting of agenda (method and form).
Proposals and preliminary drafts (priority).
Reservations.

C. *Procedure of the Conference* (Rules of Procedure).

Rank and precedence.
Language employed (translation, interpreters).
Chairmanship (provisional chairmanship).
The Bureau: its competence.
Powers of the Chairman.
Verification (exchange, deposit) of full powers.
Unlimited powers. Full powers.
Limited powers.
Authorisation.
Instructions.
Credentials of diplomatic agents.
Committees and sub-committees.
Their members.
Drafting committee.
Rapporteurs; co-rapporteurs.

Debates.
Rules to be followed during the debates.
Agenda.
Proposals. Manner, initiative, priority. Placing of new questions on the agenda.
Draft resolutions, amendments and motions.
Previous question: motion for suspension.
Voting: method and form.
Unanimity. Absolute majority. Specified majority.
Plurality of votes.
Voice in the decision.
Voice in the discussion.
Right of a minority to withdraw.
Right of protest.
Declarations. Reservations.
Minutes (records).
Intrinsic value. Form. Adoption.
Publicity. Public and private meetings.
Press report.
Final Act.
Protocol of Closure.

The extent of the codification to be undertaken would depend on which of the three methods referred to above was chosen. The first and second alternatives would involve dealing particularly with the subjects specified under B and C of the above list (Preparatory Procedure and Rules of Procedure).

From the legal point of view, such regulations would not offer very serious difficulties as far as drafting the rules in question was concerned, since this part of the subject-matter belongs to the domain of usage and of "form" and since, apart from this, the rules would have the character of strictly directive and subsidiary "model regulations," the States having full freedom to make use of them or to draw up special regulations according to the requirements of actual cases.

Codification undertaken on the third system, however, should also cover the more or less delicate questions indicated under A (Organisation). Such regulations would have to some extent an obligatory character as embodying positive rules based on the guiding principles of international customary law (concrete law), defining the limits of their application from the legal point of view, and endeavouring at the same time to provide a satisfactory solution for controversial questions coming within the competence of the organs and representatives of the various States. The drafting of rules of the latter type would require special care (particularly as regards the application of the principle of the legal equality of States).

With a view to a full investigation of the subjects enumerated above, the Rapporteur has prepared two detailed and annotated questionnaires on the subject-matter of the questions entrusted to the Sub-Committee; these questionnaires also provide an analysis of the various questions from the point of view of the proposed codification. They should be annexed to the report if the Committee of Experts decides to recommend the regulation in question to the Governments.

* * *

As regards more particularly the *second part* of the Sub-Committee's task, *i.e.*, the problem of the codification of the rules to be applied with regard to the *conclusion* and *drafting of treaties*, the Rapporteur wishes to point out in the first place that all the subject-matter comprised by this problem has been recently dealt with at length by Ludwig BITTNER in the work quoted above (*Die Lehre von den völkerrechtlichen Vertragsurkunden*, Berlin, 1924). The author has endeavoured to deal with the subject in all its details and to consider all the aspects of the form of treaties, without neglecting the questions of substance which are intimately connected therewith.

Among other works principally devoted to the study of the form of international treaties, reference may be made to the well-known diplomatic handbooks of Charles B. DE MARTENS, *Guide diplomatique;* P. PRADIER-FODÉRÉ, *Cours de droit diplomatique;* SATOW, *Diplomatic Practice;* J. W. FORSTER, *Practice of Diplomacy*, Boston, 1906; and the special study of S. B. CRANDAL, *Treaties: Their Making and Enforcement*, Washington, 1916.

Having regard to the actual text of resolution (*g*), the Sub-Committee should confine its attention to the subject-matter summarised in the following list:

LIST OF SUBJECTS TO BE EXAMINED

CONCLUSION AND DRAFTING OF TREATIES

*General Ideas:*

Definition of treaties.
Classification of treaties.
The following must be excluded:
General theory of the validity of treaties, the effects of treaties, their execution, sanctions, termination, prolongation, confirmation, renewal, etc.

A. *Methods of Conclusion.*

Subject-matter of treaties.
Organs of conclusion. Questions of competence.
1. Direct representation.
Supreme executive power:
Chiefs of States.
Collective constitutional organs.

2. Delegated representation.
   Mandated authority:
   Minister of Foreign Affairs.
   Diplomatic agents.
   Special delegates.

Methods of conclusion.
1. Direct (immediate) conclusion (simple juridical act).
2. Indirect (mediate) conclusion (composite juridical act).
   A. Mandate.
   B. Negotiation of treaties (preliminary draft).
   C. Ratification (completion of the treaty).

B. *Forms of Conclusion* (drafting).
Nomenclature:
Treaty, Pact, Convention, Agreement, Arrangement.
Protocol, Declaration, Exchange of diplomatic notes.
1. *Mediate Conclusion.*
Diplomatic instruments.
Intrinsic conditions, extrinsic conditions, essential conditions.
Type of solemn treaty.
Preamble. Subjects, organs, object of treaty (*Narratio*).
Description of mandatories.
Their authority to negotiate:
   (*a*) Full powers.
   (*b*) Authorisation.
   (*c*) Instructions.
The body of the treaty (*Dispositio*).
Stipulations: general clauses; special clauses.
Principal articles, subsidiary articles, general and special articles.
Separate, additional and supplementary articles.
Final part of treaty (*Corroboratio*).
Special clauses:
   Ratification clause.
   Clauses as to coming into force, duration, denunciation.
   Clauses allowing adhesion (accession).
Place, date, number of copies.
Signature, initials, seal, alternation of order of signature in the different copies.
Accessory instruments. Annexes.
Reservations.
Final Act.
Protocol of Closure.
*Ratification* (from the point of view of form).
Instrument of ratification.
Exchange and deposit of the instruments of ratification.

Procès-verbal of exchange of instruments of ratification.

2. *Direct Conclusion.*
   Simplified formulas.
   Declaration.
   Protocol.
   Diplomatic notes.
   Interpretation.
   Modification of treaties.

C. *Publication of Treaties.*
   Registration (Article 18 of the Covenant of the League of Nations).

D. *Spheres of International Law and Municipal Law* (constitutional law).
   Theories in dispute:
   (*a*) Ratification.
   Refusal to ratify.
   Incomplete ratification.
   (*b*) Concurrence of legislative bodies.

This list, without going into details, gives an idea of the extent of ground to be covered.

The Rapporteur on this occasion cannot do more than make certain general observations indicating the possibilities of methods which might be applied to the codification of the points in question.

The different classifications of international treaties are as numerous as the writers who have dealt with them, and vary with the individual point of view. Most of them are of little practical value.

Nevertheless, it is the duty of the Rapporteur to call the attention of the Committee to the prevailing anarchy as regards terminology (treaty, convention, pact, agreement, arrangement, protocol, declaration, etc.). Up to the present, all attempts to obtain a uniform classification based on principles which take due account of the need of co-ordinating nomenclature, form and contents, have failed. In practice, little attention is paid to the exact meaning which should be given to terms customarily used.

The choice of nomenclature and form is governed by arbitrary considerations and depends upon the nature of the relations between States, the custom of the respective chancelleries, and sometimes even upon the carelessness of those who draft diplomatic instruments.

The Rapporteur sees no need to propose that these questions, which indeed are of no legal importance, should be regulated by treaty agreement, since in his opinion the remedy lies in the regular practice of registration as provided in Article 18 of the Covenant of the League of Nations, which is bound sooner or later to lead more or less automatically to the desired standardisation of nomenclature. At the same time, a certain elasticity in terminology is both inevitable and necessary in order that States may be left the freedom they require.

* * *

The exact sphere of codification within the strict meaning of the Sub-Committee's mandate is indicated above under the headings "A" and "B" in the list of subjects (Methods of Conclusion, Forms of Conclusion).

The codification of the points contained therein may be considered from various points of view:

1. A codification relating solely to form, the scope of which is indicated above, particularly under "B" (Forms of Conclusion), would consist in establishing formulas for all existing diplomatic instruments as "prescribed models." This would result in a list of formulas generally recognised as being in "good and due form" for the purpose of concluding actual treaties.

Such a compilation would constitute a valuable official diplomatic manual, particularly if the formulas were prepared in several languages. It would be of great practical assistance in preventing faulty drafting and would make for greater precision and clearness in treaties. From a practical point of view, codification of this kind would not necessarily require conventional regulation. The Rapporteur considers that it would be sufficient if such a manual were prepared and published by the League of Nations, provided it did not contain new elements.

2. It would be different, however, if it were proposed to introduce changes in the forms which have come to be generally accepted.

What changes could or should be made?

The first aim should be to simplify existing forms.

The formulas of treaties and diplomatic instruments concluded by mediation (the typical solemn instrument, full powers, the instrument of ratification) have developed since the twelfth and thirteenth centuries under the predominating influence of the French and English Chancelleries. These formulas date back to mediæval times, long before the beginning of the constitutional life of modern States and, further, to forms of government which permitted no delegation of powers.

It follows that the tenor of some of the inherited official formulas referring to ratification is no longer in complete accord with contemporary legal ideas. It would be well to make some concession to the modern spirit, but that is not a subject which can be considered by the Committee, since it is primarily a question of internal law and therefore not a matter for international regulation. Moreover, the difficulty of any attempt at reform would be increased by the respect felt for tradition.

There are, however, other questions relating to the simplification of formulas which come within the limits of the problem before us, without encroaching upon the province of constitutional law. One of these is the introduction of a uniform style in certain special clauses in the final part of treaties, the forms for which are often defective and even inexact, being sometimes too vague and sometimes too narrow.

3. As regards the points included in the above list under "A" (Methods of Conclusion), the question of regulation assumed a different aspect (as in the

case of Group A of the list drawn up for the examination of questions of procedure at international conferences).

These are, first and foremost, questions of the competence of representatives entrusted with the negotiation and conclusion of treaties.

These questions can only form the subject of international regulation in so far as security and good faith in international relations require that the limits of the powers and capacity of the representatives entrusted with the negotiation and conclusion of treaties on behalf of the State should be defined from the point of view of international law.

The Rapporteur is of opinion that conventional regulation of the questions in this group would meet with no serious obstacles, provided, however, that the aim in view was limited to a strict codification of generally recognised principles of international law and to the settlement of certain questions which are actually the subject of controversy.

* * *

The question of the importance of the publication of treaties after registration as laid down in *Article* 18 *of the Covenant* should logically be considered along with problems regarding the conclusion of treaties, but as this question has already been included among those to be discussed by the League of Nations, the Sub-Committee decided not to deal with it.

* * *

It follows as a logical consequence from the general character of the powers conferred upon the Committee of Experts that their codifying work must not encroach upon the sphere of internal law.

The Rapporteur has nevertheless included the problem of *ratification* and that of the *concurrence of legislative bodies* in the list of subjects to be examined, for the following reasons:

Among the questions dealt with by writers on international law these two problems are the most discussed and the most highly controversial. All theoretical attempts to explain on uniform lines the relation between the two spheres of law, in matters concerning the validity of international treaties, encounter an obstacle in the diversity of constitutional laws. The gulf created between the two spheres of law by the rapid democratisation of modern constitutions, on the one hand, and respect for the traditional forms of international law (which is a characteristic of all customary law), on the other hand, is too wide to be bridged. As a result, intercourse between nations sometimes suffers from legal uncertainty and obscurity when the conditions governing the validity of treaties are not the same in the two spheres of law.

Quite recent practice appears to be in favour of first ensuring the internal validity of treaties, but this treatment of the question can obviously only apply to particular cases and can provide no answer to disputed points of theory.

Settlement by codification being excluded, would it not at least be possible to seek means of solving the problem in order to safeguard the legal relations between States?

The various kinds of constitutional clauses referring to these questions and the different interpretations given of them—interpretations which may in the future differ still further—make the legal position in the matter very vague. The rapporteur thinks that legal relations between States would greatly gain both in security and clearness if Governments decided to notify such clauses to one another together with the authentic interpretation which they give to them in practice.

This idea is not entirely new and is akin to the proposal formulated by the League Secretariat in Article 10 of its memorandum of May 19th, 1920.

The Rapporteur has no doubt that such a list of the constitutional clauses of all countries, accompanied by their authentic interpretation, would greatly help in clarifying international relations.

* * *

*Conclusion*

Sub-Committee G, having concluded its first preparatory examination of the matters with which it is instructed to deal, is of the opinion that the points specified in the terms of reference are suitable for regulation by the methods and to the extent mentioned in the report.

The Sub-Committee proposes that the subjects specified under Question (*g*) should be placed on the list of subjects of international law the regulation of which by international agreement would seem to be desirable and realisable.

(*Signed*) Dr. A. MASTNY,
*Rapporteur.*
S. RUNDSTEIN,
*Member of the Sub-Committee.*

II. REMARKS BY M. RUNDSTEIN

[*Translation.*]

I am in general agreement with the views expressed by Dr. Mastny in his report. In particular, I think that action should take the form of suggestions to Governments; it is for the Governments to make exact and definite regulations. The consent of Governments could be obtained if the regulations to be established were regarded as *jus dispositivum* without restricting the freedom of States. In this matter, the principle of liberty must be observed.

With regard to the problem of drafting and concluding treaties I should like to draw attention to the question of executing international conventions. Regulations established by international convention require executive

measures in the form of decrees or even internal laws. Otherwise they are of no value, for the administrative and judicial authorities in the different countries would have no legal grounds for putting them into execution (for example, a convention requires the contracting parties to execute judgments given by a mixed arbitral tribunal, or to modify existing laws which remain binding until they are expressly repealed). It would be perhaps desirable to recommend the introduction of a special clause whereby the contracting parties would undertake to notify the promulgation of laws or administrative regulations necessary in order to execute a convention which has come into force.

Furthermore, I consider that the following problems should be examined:

1. The question of adhesion.
2. The question of difficulties of interpretation in cases in which a convention is drawn up in more languages than one.
3. The question of converting duly ratified and internationally valid conventions into internal laws.

Geneva, January 12th, 1926.

(*Signed*) S. RUNDSTEIN.

### III. LISTS OF MATTERS SUSCEPTIBLE OF REGULATION

*Modified by the Rapporteur in consequence of the Discussion in the Committee of Experts*

#### LIST I

*Procedure of International Conferences*

A. *Organization.*

Questions of competence.

(*a*) Delegates plenipotentiary. Principal representatives.
Assistant delegates. Substitute representatives.
Secretaries of delegations.
Experts.
Technical assistants.
Auxiliary staff.

(*b*) Observers.

Diplomatic privileges and immunities.[1]

B. *Preparatory Procedure.*

Initiative, invitation, replies, convocation.
Previous agreement on the subjects of the conference.
Establishment of the agenda (method and form).
Proposals and drafts.
Reservations.

[1] See the special questionnaire on this matter (Questionnaire No. 3).

C. *Procedure of the Conference (Rules of Procedure).*

Order of delegations.
Language, translation, interpreters.
Provisional chairmanship. Chairmanship.
The Bureau: its composition; its powers.
Powers of the Chairman.
Exchange or deposit of powers, verification.
Full powers.
Limited powers.
Powers of diplomatic agents as such.
Committees and Sub-Committees: their composition.
Drafting Committee.
Discussion and rules of debate.
Proposals. Draft resolutions, amendments and motions.
Previous question: motion for suspension.
The right to vote:
1. Plurality of votes. Voice in the decision. Voice in the discussion.
2. Necessity for unanimity. Absolute majority. Specified majority.
3. Ballot. Method and form.

Right of a minority to withdraw.
Right of protest.
Declarations, reservations.
Minutes (records): form; approval.
Publicity. Public sittings and non-public sittings.
Final Act.
Protocol of closure.

## List II

### *Conclusion and Drafting of Treaties*

A. *Methods of Conclusion.*

Capacity to conclude treaties.
Organs for concluding treaties. Questions of competence.

B. *Forms in which Treaties may be concluded and drafted.*

Nomenclature:
Treaty. Pact. Convention. Agreement. Arrangement.
Protocol. Declaration. Exchange of diplomatic notes.
Diplomatic instruments:
Intrinsic and extrinsic conditions.
Essential conditions.
Type of solemn treaty:
Preamble. Subjects, organs, object.

Description of mandatories.
Their authority to negotiate.
The body of the treaty.
Stipulations: General clauses; special clauses.
Principal, accessory, general, particular articles.
Separate, additional, supplementary articles.
Final part of treaty.
Special clauses.
Ratification clause.
Clauses as to coming into force, duration, denunciation.
Clauses allowing adhesion or accession.
Stipulations for the communication of laws or regulations necessary for the execution of a treaty.
Place, date, number of copies, by whom copies are to be delivered.
Signature, initialling, seal, alternation of order of signature in the different copies.
Accessory instruments. Annexes.
Reservations.
Final Act.
Protocol of Closure.
The ratification.
The instrument of ratification.
Exchange, deposit of instruments of ratification.
Procès-verbal of exchange of instruments of ratification.

Simplified formulas:
Declaration.
Protocol.
Diplomatic notes.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 6

*adopted by the Committee at its Second Session, held in January 1926*

## PIRACY

The Committee has the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether, and to what extent, it would be possible to establish by an international convention, appropriate provisions to secure the suppression of piracy."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee consisting of M. MATSUDA as Rapporteur and M. WANG CHUNG-HUI.[2]

The nature of the general question and of the particular questions involved therein appears from the report. The report contains a statement of principles to be applied and of particular solutions derived from these principles. The Committee considers that this statement indicates the questions to be resolved for the purpose of regulating the matter by international agreement. All these questions are subordinate to the larger question set out above.

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the general principles set out in the report or the solutions suggested for various particular problems on the basis of these principles. At the present stage of its

[1] See Assembly Resolution of September 22nd, 1924.

[2] M. Wang Chung-Hui signed the original text of the Sub-Committee's report. Having unfortunately not been able to attend the session of the Committee of Experts, he is not responsible for the actual text as annexed to the present document, this text containing certain amendments made by the Rapporteur as a result of the discussion in the Committee.

work, it is not for the Committee to put forward conclusions of this kind. Its sole, or at least its principal, task for the present consists in drawing attention to various questions of international law the regulation of which by international agreement would seem to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but should put forward the proposed questions with sufficient detail to facilitate the decision as to the desirability and possibility of their solution. The necessary details will be found in the final conclusions of M. Matsuda's report.[1]

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

ANNEX

## REPORT BY THE SUB-COMMITTEE

M. MATSUDA, *Rapporteur.*
M. WANG CHUNG-HUI.[2]

*Whether, and to what extent, it would be possible to establish, by an international convention, appropriate provisions to secure the suppression of piracy.*

[*Translation.*]

Authors of treaties on international law often differ as to what really constitutes this international crime. In order to avoid any confusion, a clear distinction should be drawn between piracy in the strict sense of the word and practices similar to piracy. The former comes within the scope of international law in general, the latter either under international treaty law in force between two or more States or simply under a national law. We will examine each of these aspects of the problem in turn, although the first alone is of real general importance from the international point of view.

### A. PIRACY IN INTERNATIONAL LAW

I. According to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence

[1] See page 228.
[2] See Note 2 on preceding page.

against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.

Piracy has as its field of operation that vast domain which is termed "the high seas." It constitutes a crime against the security of commerce on the high seas, where alone it can be committed. The same acts committed in the territorial waters of a State do not come within the scope of international law, but fall within the competence of the local sovereign power.

When pirates choose as the scene of their acts of sea-robbery a place common to all men and when they attack all nations indiscriminately, their practices become harmful to the international community of all States. They become the enemies of the human race and place themselves outside the law of peaceful people.

Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification "for private ends." It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law.

By committing an act of piracy, the pirate and his vessel *ipso facto* lose the protection of the State whose flag they are otherwise entitled to fly. Persons engaged in the commission of such crimes obviously cannot have been authorised by any civilised State to do so. In this connection we should note that the commission of the crime of piracy does not involve as a preliminary condition that the ship in question should not have the right to fly a recognised flag.

Every enterprise for the purpose of committing robbery at sea is not necessarily piratical in character. A wrecker, for instance, unlike a pirate, has a nationality, despite the fact that he is indirectly a menace to safety at sea. In like manner, a mere quarrel followed by acts of violence or depredations occurring between fishermen on the high sea ought not to be regarded as an act of piracy, since such acts do not constitute a menace to the international maritime commerce for the protection of whose security every civilised State is to some extent interested in intervening so far as its power permits.

A ship may clearly be a pirate ship even if it was not fitted out for that

purpose or if it began its voyage without criminal intention. If a mutiny breaks out on board and the mutineers seize the vessel and use it to commit acts of piracy, the vessel *ipso facto* loses the original protection of its flag.

Acts of piracy can as a general rule only be committed by *private* vessels. A warship or public vessel can never, so long as it retains that character, be treated as a pirate. If such vessels commit acts of depredation or unjustifiable violence, the State whose flag they fly demands reparation from them and has to inflict suitable penalties upon the commander and crew and pay lawful damages to the victims of such acts. If the crew of a warship or other public vessel mutinies and sails the seas for its own purposes, the vessel ceases to be a public one, and the acts of violence which it commits are regarded as acts of piracy.

The case appears more difficult when there is a civil war and the regular Government's warships take the side of the rebels before the latter have been recognised as belligerents. The regular Government sometimes treats such ships as pirates, but foreign Powers ought not to do so unless these ships commit acts of violence against vessels belonging to the Powers in question. Third Powers, on the other hand, may consider such ships as pirates when they commit acts of violence and depredations upon vessels belonging to those Powers, unless the acts are inspired by purely political motives, in which case it would be exaggeratedly rigorous to treat the ships as declared enemies of the community of civilised States.

II. Before taking action against pirates, it must first be ascertained that they really are pirates. The mere fact of hoisting a flag does not prove the right to fly it; and, accordingly, if a vessel is suspected of piracy, other means have to be used to establish its nationality.

The two following principles are recognised both by law and in practice:

(1) Any warship has the right upon the high seas to stop and seize any vessel, under whatever flag it may be sailing, which has undoubtedly committed an act of piracy.

(2) If the vessel is only under suspicion, the warship is authorised to verify its true character. It must, however, use this right judiciously and with caution. The commander of the warship is responsible for any action taken. If, after inspection of the suspected vessel, the suspicion proves to have been unfounded, the captain of the suspected vessel is entitled to reparation or compensation, according to circumstances.

If, on the other hand, the suspicion of piracy is confirmed, the commander of the warship either himself proceeds to try the pirates (unless the arrest took place in the territorial waters of a third Power) or he brings them into the port of some country to be judged by a competent tribunal, and the fate of the vessel and its crew is determined by the domestic law of the country in question. The attacks of pirates are directed against the interests of maritime trade throughout the world, and pirates are therefore justiciable in every civilised country. The State which seizes the pirate

vessel and arrests the crew is the obvious judge of the validity of the capture and the guilt of the parties concerned. It should by preference be accorded the right to investigate and to pass judgment in the case, unless the internal law or some international convention otherwise decides, or unless the case is that dealt with in the following paragraph.

May a warship pursue and arrest pirates in the territorial waters of a foreign Power without thereby violating the sovereign rights of that Power? Under normal circumstances, the sovereign of the territory alone has the right, in territorial waters, to protect national and international interests; but in the case of acts intended to safeguard international relations, it would appear reasonable to assume that the Government of the territory tacitly consents if it is not in a position to continue the pursuit successfully; otherwise, if the coastal State could not take the necessary measures to carry through the pursuit in time, the result would be to facilitate the flight of the pirate and enable him to escape punishment. In such cases, however, the right to try for piracy devolves upon the State to which the territorial waters belong. It is the recognition due to its sovereignty. The right to pursue, attack and seize a pirate belongs to warships.

The effects of the capture, the consequences of the validity of the seizure, the right of recovery by the lawful owners and the reward to be given to the captors are questions which are governed by the law of the State having jurisdiction. Accordingly they are solved in a different manner by each State, either in its domestic legislation or in its special conventions. The following four conditions must as a rule be fulfilled in the exercise of the right of recovery and restitution of the goods stolen:

(1) The owner must lodge his claim within a year after sentence of capture has been passed;

(2) The claimant must vindicate his claim of ownership before the competent tribunals;

(3) The costs of recovery are fixed by such tribunals;

(4) The costs must be borne by the owner.

### B. Piracy in Treaties and Special Laws of States

In addition to piracy by the law of nations, States have occasionally, by treaty or in their internal law, established a piracy by analogy which has no claim to be universally recognised and must not be confused with true piracy; the assimilations in question can only create a sort of piracy under internal law and from the point of view of the countries which make them. The acts dealt with are of a grave nature, it is true, but they do not constitute a danger to the shipping and commerce of all nations indiscriminately. Legislators are justified in taking strong measures in such cases, but the classification of such acts as piracy is a fact which only concerns the State whose laws contain provisions to that effect. From the international point of

view, the acts come within the competence only of the country in which they are punishable. No country making a capture can cite them as the basis of a claim to international competence nor can they justify actual capture by a foreign State unless there is a convention which expressly provides otherwise.

We shall now examine the salient facts and the commonest of these analogous forms of piracy. In the first place, there is privateering.

1. The immediate object of privateering is the use of violence for purposes of gain, and this gives it a certain resemblance to piracy.

Although the object of the privateersman is to take the property of others, his acts are only committed against the national enemy of the country which has given him his letters of *marque*. This circumstance gives him a legal standing as regards nationality; at the same time it places responsibility upon the nation whose flag he flies, and thereby excludes any idea of piracy. Moreover, if a vessel so commissioned infringes the rights of other nations by acts of violence or irregularities which exceed the powers it holds, it cannot on that account be regarded as a pirate unless its intention is obviously piratical. In such a case, the State which commissioned it is responsible to other countries for any illegal acts it may commit, and has the right to try and punish.

2. Vessels have also been regarded as pirates when, their own countries remaining neutral, they received a commission from a foreign belligerent State and captured vessels belonging to a Power which, while an enemy of that State, was at peace with the vessel's own country.

This, too, is not piracy according to international law, but only according to the domestic law of one or more States.

Certain writers hold that, as a result of the acts it commits, such a vessel is denationalised, and is not legitimately under the protection of any flag; such acts would thus be true acts of piracy according to international law. This view, however, is mistaken; such a vessel is not denationalised. It is covered in respect of third Powers by the commission it has received. It has a respondent answerable to third Powers, namely, the State which commissioned it and which becomes liable for its acts. Lastly, it should be borne in mind that the vessel does not attack all merchant shipping indiscriminately; it merely captures the vessels of the Power at war with the State which commissioned it. It makes war upon a certain nation. It is not an enemy of the human race. This, then, cannot be said to be a case of piracy under international law, but such a vessel can certainly be classed as a pirate by the domestic law of an individual State.

3. Then, again, the sailors forming the crew of a merchant ship are generally treated as pirates if they mutiny against the commander during a voyage, murder him and the other officers and seize the ship. But this too is piracy only under the domestic law of individual States.

4. Governments struggling to quell a rebellion have an incontestable

right to describe as pirates, or to announce that they will treat as pirates, rebels who sail the seas for the purpose of seizing property belonging to subjects or citizens who have remained faithful to the duly established authorities. Rebellions are entirely a matter for the domestic law of the individual State, and a Government has every right to threaten to treat rebels as pirates, however widespread the rebellion may be.

Foreign Powers, however, are not obliged to accept this description or agree to such persons being treated as pirates.

### C. Conclusions

The confusion of opinion on the subject of piracy is due to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual States. In our view, therefore, it would be preferable for the Committee to adopt a clear definition of piracy applicable to all States in virtue of international law in general. Accordingly, we have the honour to submit to the Committee the following draft.

### Draft Provisions for the Suppression of Piracy[1]

*Article* 1.—Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

*Article* 2.—It is not involved in the notion of piracy that the ship should not have the right to fly a recognised flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.

*Article* 3.—Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses it public character.

*Article* 4.—Where, during a civil war, warships of insurgents who are not recognised as belligerents are regarded by the regular Government as pirates, third Powers are not thereby obliged to treat them as such.

Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives.

*Article* 5.—If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea.

On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral State, a pursuit commenced on the

[1] As amended by M. Matsuda as the result of the discussion in the Committee of Experts.

high sea may be continued even within territorial waters unless the littoral State is in a position to continue such pursuit itself.

*Article* 6.—Where suspicions of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

*Article* 7.—Jurisdiction in piracy belongs to the State of the ship making the capture, except: (*a*) in the case of pursuit mentioned in Article 5, paragraph 2; (*b*) in the case where the domestic legislation or an international convention otherwise decides.

*Article* 8.—The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the captors, are governed by the law of the State to which jurisdiction belongs.

Geneva, January 26th, 1926.

(*Signed*) M. MATSUDA.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 7

*adopted by the Committee at its Second Session, held in January 1926*

## EXPLOITATION OF THE PRODUCTS OF THE SEA

The Committee has the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Government of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea."

M. Suarez was requested to examine this question with special reference to the treaties dealing with the subject.

The Committee has the honour to communicate to the Governments a report submitted to it by M. Suarez.

The practical importance of the question appears to be established by this report and is emphasised in the conclusions which are there reached. The Committee considers that the report indicates in broad outline the problems which a conference including experts of various kinds might be called upon to solve, and feels it a duty to emphasise the urgent need of action.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before October 15th, 1926.

M. Suarez' report is annexed.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

[1] See Assembly Resolution of September 22nd, 1924.

ANNEX

## REPORT ON THE EXPLOITATION OF THE PRODUCTS OF THE SEA

*Rapporteur:* M. JOSÉ LEÓN SUÁREZ.

[*Translated from the Spanish.*]

At its private meeting on April 8th last, the Committee of which you are Chairman adopted the following resolution in paragraph (*j*):

> "The Committee appoints a sub-committee to enquire, with reference, *inter alia*, to the treaties dealing with the subject, whether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea."

The Sub-Committee appointed consists only of the author of the present report.

I may recall the fact that my original proposal submitted at the meeting on April 6th read as follows:

> "Should not a special technical conference be convened, to draw up immediately, without regard to the extension or maintenance of maritime jurisdiction extending to the three-mile limit, uniform regulations for the exploitation of the industries of the sea, whose wealth constitutes a food reserve for humanity, over the whole extent of the ocean bed forming part of the continental shelf, *i.e.*, the region along the coasts where the depth does not exceed 200 metres?"

It is important to remember this text because, after studying the proposal as drafted by my distinguished colleague M. Fromageot, in which he makes reference to *existing treaties* dealing with the subject, I am bound to express the opinion that the problem, which, as I originally put it, was a simple one, has been complicated by the text adopted and that its scope has been greatly extended while no progress has been made towards its solution. Moreover, this way of putting the question has made it impossible for me to send my report earlier. Although I arrived at Buenos Aires at the end of June, or some five months ago, owing to the fact that the shipping companies organising the return service run only one steamer of the same class every month, I am still awaiting replies to the request for information regarding international maritime legislation which I sent from Europe to various legations and institutions in order to acquaint myself with all the available data. Owing to the delay in obtaining information and to the fact that correspondence between Europe and Buenos Aires takes at least a month, and owing also to all the business I had to neglect during my absence and my return to Europe to attend the January session, I have been unable to study the ten or twelve important treaties which, out of the twenty or thirty in existence, might be of value to me in carrying out the Committee's instructions.

I am familiar, however, with their general purport, and know that they can be of little value except as forming precedents for the proposal, which originally, I repeat, did not aim at laying down international regulations for hunting and fishing at sea but at convening a committee of experts, representing as far as possible all the Governments directly concerned, to draw up regulations according to the carefully considered procedure of successive discussions which the Committee has adopted and which obviates any possibility of hasty decisions.

There is therefore a difference between the principle I proposed and that adopted by the Committee. The former obviates the difficulty which is inherent in the latter. As international regulation has hitherto been of a limited and local character and has, except in two or three cases, been directed not solely to the protection of species from extinction but mainly to establish police measures and to ensure reciprocity and *commerce*, regardless of biological interests, which in this case are inseparable from *economic* and *general* interests, this regulation, though it has been of value on occasion, is no longer adequate. The result of pursuing the international regulation of hunting and fishing at sea in the restricted sense hitherto accepted has been the useful but by no means sufficient one of delaying, but not preventing, the extinction of some of the principal species. And as, if we consider the life of all the species in the animal kingdom, biological solidarity is even closer among the denizens of the ocean than among land animals, the disappearance of certain species would destroy the balance in the struggle for existence and would bring about the extinction of other species also.

The wealth constituted by the creatures of the deep is not fixed in the sense of being confined to one region or latitude but varies from year to year according to the biological, physical and chemical circumstances affecting the *plankton* among which they live. The majority of aquatic animals are essentially migratory, and it is this characteristic which creates the biologico-geographical solidarity of species, which should find its counterpart in a legal solidarity in the sphere of international law in which we are working.

This urgent necessity for international regulation of the exploitation of the biological wealth of the sea is a new phenomenon to jurists but is familiar to all those who are brought into contact with the creatures of the deep, either in the pursuit of gain or in the interests of science. *The marine species of use to man will become extinct unless their exploitation is subjected to international regulation.* It is this situation, Gentlemen, which must be considered, and not the existing treaties, which in their time were a palliative but never a cure and which to-day are no longer sufficient and even constitute a danger, either because the species in question migrate for natural reasons from places where they are protected to places where they are uneconomically exploited or because, when they are hunted to excess in

certain areas, they take refuge in other waters where they are less molested, thus constituting, in practice, a monopoly in favour of certain countries.

The human race is already beginning to experience a shortage of food, and this shortage is likely to be accentuated, owing not only to the increase of population but to the growth of the average consumption of each individual. As the democratic organisation of society improves, so man increases his consumption, particularly of meat and corn. This is due not only to a physiological but to a psychological necessity—the craving to make up for past deprivation of meat, which has generally been regarded as a food reserved for the rich. Coming as I do from a country whose main export is meat and corn, I am not influenced by any immediate apprehensions or by my own material interests, for it is clear from the present tendency of the world meat market that the republics of the Plata enjoy great natural advantages, and that, as the cattle-rearing industry exhausts the reserves of production, the greater the demand the greater will be the value of the supply. I am not considering, however, the interests of the moment or of any particular country but the general interest of mankind, which before long will have to draw upon the reserves of the sea to make good the inadequacy of the food production of the land. It is our business to see that this step is not taken too late.

The exploitation of the products of the sea requires regulation the most urgently in the waters nearest the coasts, because it is in these regions, and particularly on the shoals, that the species most useful to man have their habitat. In the open sea away from the continental shelf, where the depth exceeds 200 metres, only a few species useful to man are to be found in the upper levels of the sea. Apart from the waters in the immediate vicinity of the beach, it may be said to be a natural law that the intensity and variety of marine life is inversely proportional to the depth of the water.

If we are to do work of real value to the community, therefore, we cannot (subject to the necessary exceptions) make our enquiries with reference to "the treaties dealing with the subject." In proof of this I may cite the opinion of all the experts I have consulted in various countries, including the United States, which has been the most successful in regulating these questions, and which, owing to its geographical position, is the country which least requires international co-operation to preserve its maritime wealth. These various opinions may be summed up in that of the Argentine expert M. Luciano H. Valette, who has been most helpful to me on this and other occasions. Referring to proposal (*j*), with which the present report deals, M. Valette, who is chief of the Fisheries Department of the Argentine Ministry of Agriculture, said:

> "*You cannot fail to perceive the discrepancy which exists between the actual biological facts and the principles embodied in existing international conventions and treaties, to which you are asked to subordinate your opinion and adapt your report in conformity with the resolution adopted*

*by the Codification Committee in paragraph (j). I gather that your original proposal, which was conceived on the soundest possible lines, has been condemned; none the less I hope that, even if the European members of the Committee at Geneva fail to realise its urgency, it will triumph in the narrower but more congenial sphere of American interests."*

There can be no political, economic or other objections to the recommendation that all Governments having maritime interests should hold a conference of experts to determine what species should be protected and in what districts, to decide what form this protection should take in order to prevent their extinction, and to draw up the main principles of international regulation. The United States, once they had prevented the extermination of the seal in the north-west by means of an agreement with Great Britain, Russia and Japan, which they later supplemented by uniform regulations governing hunting and fishing along the shores of the various States of the Union, appeared to be dispensed from the necessity of calling in the aid of international law. Now, however, that the sea is becoming replenished with species which were at one time almost extinct, experience is showing that the work is incomplete; for animals, happier in this than men, are ignorant of jurisdiction and national frontiers and observe not international law but internationalism; the sea for them is a single realm, like Ovid's dream of a world forming a single fatherland for humanity. The Conference of American Raw Fur Traders, which met at Washington under the auspices of the National Association of the Fur Industry in October 1924, adopted the following resolution 5 *a* based on the international and inter-State considerations I have outlined above: "We deem it essential and recommend that the laws relating to fur-bearing animals be formulated by the various legislative bodies in pursuance of a uniform policy of conservation and with as full co-operation as possible between States of a similar climatic or natural condition." The necessity for international co-operation is also stressed in the articles published in the National Association of the Fur Industry Year-Book, 1924. For instance, Mr. Henry O'Malley, Fisheries Commissioner of the United States, in his article on the Alaska Fur-Seal Industry, reaches the following conclusion: "From the foregoing it is plainly evident that the fur-seal industry is carried on by activity complex in character and broad in extent. It has features international in scope which must be handled through diplomatic channels."

In the Appendix will be found a list of the existing treaties. In order, however, to show how little value they possess, I shall go on to put forward a number of other considerations illustrating the force of my original proposal.

I shall be obliged to go into some of the technical antecedents of the sea fishing and hunting industry in order to convince my colleagues of the expediency of adopting my suggestion.

If proposal (*j*) as it stood were limited to *existing treaties*, it would not

cover the modern whaling industry, which is rapidly exterminating the whale. To-day it is carried out with the help of a perfected form of weapon and special craft; but the great increase in its scope is due to the manner in which the animal is treated once it has been killed. The extraction of the *oil*, which previously had to be done ashore, is now done in floating factories, which accelerates the process ten- or twenty-fold and renders national control impossible, since no action can be taken in the *open sea*, and the whalers have no need to touch land to extract the principal product from their quarry. This process is carried out principally in the southern waters of South America. Here the whales, pursued and almost exterminated in the North Polar regions, have taken refuge, driven by the instinct of self-preservation and a certain degree of rudimentary intelligence which they possess. To such a pitch of perfection have the Norwegian whalers brought their trade that one of the conditions imposed by the majority of insurance policies for this class of craft is that the harpooner and some of the crew should be Norwegian.

M. Valette, to whom I had occasion to refer above, had described this process of extracting oil from whales, and it really seems impossible that the Governments interested in preserving so important a source of wealth should do nothing to prevent its extinction, which will be complete in five to ten years at the most. "This class of fishing," he says, "has reached such a point as to be a veritable butchery, which is the more deplorable when one considers the uniparous character of whales and the length of their period of gestation."

Dr. Charcot, an eye-witness of these practices in the Antarctic seas in the vicinity of the Argentine, was so impressed that he addressed a communication to the French Colonial Ministry drawing attention to the rapidity with which whales would disappear if they went on being exterminated in a manner which he qualified as barbarous. Even fifteen years ago, Dr. Charcot emphasised the *urgent necessity of an international agreement settling such important matters as the protection of young whales, the creation of reserves for adults, and the full industrial utilisation of all the parts of the captured whale.* The Paris Academy of Science also unanimously recommended that an international committee should meet to settle the problems of fishing in the open sea, such as more thorough exploitation and the preservation of species.

These examples, only two among hundreds which might be quoted, fully demonstrate that the crying need for general international legislation has not been met by existing treaties on maritime hunting and fishing.

The absence of such legislation accelerates the disappearance of these species year by year, not so much because they are decreasing of themselves as because their destruction is becoming more intensive. The products of the fisheries are not fully utilised, and it would appear that, although all those who carry on this trade realise the harm they are doing, each is un-

willing to restrict his activities for the benefit of the others, and they endeavor to kill as many whales as they can, realising that the total extinction of the species is approaching and that they must avail themselves of such opportunities as still remain.

At the British Imperial Conference in 1923, one of the speakers, alluding to this wanton destruction, proposed that the British Empire should adopt regulations. This, however, is not possible, as the fisheries are carried on in the open sea, and the Argentine and Chile, as owners of the neighbouring coasts and islands, could claim rights at least equal to those of Great Britain, while other countries which engage in whaling in the Antarctic, such as the United States, the three Scandinavian countries, the Netherlands, Russia, and various others, could easily put forward claims as well, since, with the modern system of floating tanks and rafts, there is no need of *terra firma* for the necessary operations, quite apart from the fact that on those uninhabited islands and coasts such operations could easily be carried out openly or secretly. The present system of control (of very doubtful legality) is quite inadequate; indeed, it defeats its own ends from the point of view of the preservation of species, the only one which in this report we need consider. It takes the form of a tax imposed by the Governor of the Falkland Islands, which belong to Great Britain, at the rate of 5/– per barrel of whale-oil of approximately 170 kilogrammes. This *fiscal* system runs counter to the economising of wealth and promotes its more rapid destruction.

The riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race, and our Committee is the body best qualified to suggest to the Governments what steps should be taken before it is too late.

To save this wealth, which, being to-day the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence, not on the defective egislation which has failed to see justice done but on the scientific and economic considerations which, after all the necessary data has been collected, may be put forward, compared and discussed at a technical conference by the countries concerned. In this way a new jurisprudence will be created of which to-day we have no inkling, owing to the fact that the necessity which now arouses our legitimate apprehensions was never contemplated.

I have referred especially to whales; but other species of equal value are also in danger of extinction, such as the *pinnipedes* (with fin-like feet; from *pinna* and *pes*), to which belong various families popularly included under the generic term of seals, among them the fur-seals so highly prized by traders. These animals, being amphibious, require protection not only on land but in the sea. The rocks on which they live are often at a distance from the mainland and cannot be permanently occupied by man because they are constantly beaten and submerged by the waves. Only adequate

legislation can protect these animals, which are almost extinct in the south, as they regularly migrate from the Antarctic Ocean to the coasts of Brazil in the latitude of São Paulo. The Northern Hemisphere has been replenished with seals to a certain extent, thanks to the effective measures proposed by the United States, to which is also due the reappearance of these valuable animals in the Pribiloff and Kurile Islands.

With the help and guidance of M. Valette, I have sketched on a map,[1] which is attached to and forms an integral part of the present report, the geographical distribution of *some* of the most economically important species which should be preserved for the use of humanity. I have done this merely by way of illustration and as impartial evidence to convince my colleagues that we must accept the idea of holding a technical conference to draw up international regulations for the exploitation of certain species. I make no attempt to mention the cases of definite species but merely quote certain examples; there are many others which it would be tedious and unnecessary to enumerate here. The source of wealth which is most immediately threatened with total extinction is the whale, because its bulk prevents concealment, because its slowness of reproduction makes the replacement of casualties impossible, and because the species, being concentrated in the South Polar region after having been exterminated in the north, is attacked in these waters by fishers from every part of the world and is being exterminated with alarming rapidity. The average number of whales killed in the Antarctic every year is not less than 1,500 and sometimes as many as 2,000. No other method than international regulation can be conceived to prevent the annihilation of whales, the total remaining number of which may tentatively be put at 10,000 or 12,000 at the most. What should be the main points of such regulation? Without any more claim to be exhaustive than in my enumeration of species, I would suggest the following: establishment (in the open sea) of *reserved zones* on the basis of what is known already or may be discovered with regard to the habitat and migrations of whales; exploitation of each zone in turn and for a limited period; uniformity of methods (without going into details of a nature to hamper industrial freedom), in order to ensure the full utilisation of the products of the chase, which to-day are squandered owing to the thirst for immediate gain at all costs; adoption of general rules regarding the ages at which whales and seals should not be killed even when found in zones and during periods not subject to prohibition.

In conjunction with the facts I have adduced, particularly with regard to the South Polar region, should be taken others concerning quite different areas, which show that isolated measures of protection or measures taken by a single country are useless, and that they must as a rule be general and international in character. Most of the whales are in the south, as they are

[1] This map is not reproduced.

ruthlessly hunted in the north; but as their hunters have followed them, they are now tending to return to the north or to disperse all over the world in search of the peace they will never find. A report of the Trönsberg Whaling Company, which operates in the South American latitudes of the Pacific, mentions in a memorandum for 1924 that it made a *net* profit of 2,958,120 crowns; it paid its shareholders 50 per cent on their capital, and the balance of 1,038,120 crowns went to the reserve. This net profit at present (December 1925) represents some fourteen million French francs—an enormous sum if we take into account the amount of capital invested. There is also an Argentine company which, I believe, makes similar profits, although I have not been able to obtain details.

Encouraged by these results, and knowing that the sooner it kills the whales the more it will prevent from falling into the hands of others, as they constitute a form of wealth which will soon be exhausted, the Trönsberg Whaling Company ordered the construction of four additional whalers for the 1925–26 season.

On our chart of marine wealth we show the *herring* (*clupea harrengus*), whose preservation is of particular importance to Great Britain, Norway, the Netherlands, Germany, Belgium, and Denmark. It is also of some concern to Spain, Portugal, France, the United States, Iceland, etc., because when other kinds of fish become scarce or disappear (as has occurred on the coasts of Galicia) the fisherfolk return to their old habits and go to places often at a great distance from their coasts. They do not wait for the fish to come to them but go and seek it in its own haunts.

The salmon of the Atlantic lives in the seas and rivers of North-Western and Western Europe. Its migrations extend as far as the United States, between Cape Cod and Ungava Bay (this is as regards the Northern Atlantic). As regards the salmon of the Northern Pacific, the five exploited species of the genus *onchorhynchus* are found in the rivers of Asia and in those of Alaska and California. No one can foresee the migrations to which they may be subject in future, but it can be confidently anticipated that, within the vast areas indicated, their rational exploitation will be impossible without an international agreement on an economic and biological and not on a political or commercial basis.

Another typical species shown on the map is the cod (*gen. gadus*), which is found throughout the Northern Atlantic from the extreme north as far as the Bay of Biscay on the European side, and Cape Hatteras on the American side, but is chiefly concentrated in the Newfoundland banks.

Another fish which is much sought after is the "caballa" (*scomber scombrus*) whose migrations extend from the Black Sea to the Canaries, Scotland, France and Norway, as far as Europe is concerned, and to the north-east of America.

The ichthyological life of the South American waters has been little studied as regards habitat and migrations, but among other species may be

mentioned the hake (*cynoscion striatus*), which migrates to the waters off Brazil, Uruguay and the Argentine.

The map also shows the distribution of animals of the seal tribe, indicating the principal habitats of walruses, sea elephants and other species belonging to this genus.

A line on the map indicates to the southward the principal area in which whales take refuge, but there are also a number in the north and in the Pacific in process of migration from one Pole to the other, as has already been explained.

Until recently equilibrium existed between the production and consumption of the greater part of *fish*; the same cannot be said of animals which are *hunted*, whose numbers began to decrease some time ago. But the improvement of modern appliances and the constant progress of what Bergson might term our "age of machinery" has also had its effect on fishing. Thus, for example, herring were previously fished at certain periods of the year and not at others. The fishermen waited for them to form shoals and to approach their meeting-grounds, which became the traditional fishing-zones. This practice in itself constituted a restriction: but now, with modern methods, herring are fished *throughout the year*, and the fishers do not wait for the shoals to approach but go and look for them. If this intensive method of fishing continues, the numbers of herring, which are already falling off, cannot fail to decrease rapidly.

I have said enough with regard to the hunting of whales and seals, but it is worth mentioning that the Swiss zoologist Paul Sarazin stated, before the International Commission for the Protection of Wild Life which met at Berne in 1913, that, with the invention of floating grease- and oil-factories, which are becoming more and more numerous on the high seas and are stimulated by investments of capital seeking a higher return than can be obtained in any other industry, the most important source of marine wealth would mathematically be exhausted within a short period.

In view of the considerations I have outlined above, I venture to submit, in my capacity of rapporteur on point (*j*), the following conclusions:[1]

1. That it is possible, by means of adequate regulation, to secure the economical exploitation of the products of the sea.

2. That such regulation could not fail to be in the general interest; since, if the present confusion persists for a few years longer, the extinction of the principal species will be the inevitable consequence of their unrestricted exploitation.

3. That the treaties dealing with the subject apply only to certain species and are for the most part regional in character. They have not always taken into account the point of greatest importance to humanity,

[1] Printed as modified by the Rapporteur as a result of the discussion in the Committee of Experts.

which is to find means to prevent the disappearance of species, and not infrequently they concern measures of police or purely commercial measures, without considering the biologico-economic aspect, which is the essential aspect.

4. That the attention of all maritime Powers should be called to the urgency of establishing regulations by holding a conference including experts in applied marine zoology, persons engaged in marine industries, and jurists.

5. That, without prejudice to other matters, the general technical programme of the conference referred to in the previous paragraph might include the following:

(*a*) General and local principles for the organisation of a more rational and uniform control of the exploitation of the aquatic fauna in all its aspects;

(*b*) Creation of reserved zones, organisation of their exploitation in rotation, close periods and fixed ages at which killing is permitted;

(*c*) Determination of the most effective method of supervising the execution of the measures adopted and maintaining the control.

Buenos Aires, December 8th, 1925.

José León Suárez.

## Appendix

### List of international treaties on the regulation of maritime industries

1. International Convention for regulating the Police of the Northern Sea Fisheries outside Territorial Waters. The Hague, May 6th, 1882.

Declaration modifying Article 8 of the Convention of 1882. February 1st, 1889. (Great Britain, France, Germany, Denmark, Belgium, Netherlands.)

2. Convention on the Liquor Traffic among Fishermen, signed at The Hague by the same Powers. November 16th, 1887.

3. Convention between the United Kingdom, the United States, Japan and Russia for the Preservation and Protection of the Fur-Seals in the North Pacific Ocean. July 7th, 1911.

4. Treaty regarding Spitzbergen, between the United States, Great Britain, Denmark, France, Italy, Japan, Norway, Netherlands and Sweden. Paris, February 9th, 1920. (Article 2.)

5. Great Britain and Belgium. March 22nd, 1852; May 2nd, 1891; August 26th, 1891. (North Sea Fisheries.)

6. Great Britain and Denmark. June 24th, 1901. Faröe Islands and Iceland.

7. Fisheries Convention, France and Great Britain. August 2nd, 1839.

8. Declaration concerning the Obligations of Fishermen in the Seas between the Coasts of France and Great Britain. June 23rd, 1843.

9. Convention concerning Newfoundland and West and Central Africa, London, April 8th, 1904. (France and Great Britain.)

10. Declaration by France and Great Britain: Oyster Fisheries. September 29th, 1923.

11. Great Britain and Netherlands. Allowances to Witnesses in Fishery Cases. April 26th, 1902.

12. Convention between France and Italy on Reservations in the Fisheries between Corsica and Sardinia. Rome, January 18th, 1908.

13. Great Britain and Nicaragua: Turtle Fishery. May 6th, 1916.

14. Great Britain and Sweden. July 17th, 1856 (Article 10).

15. Great Britain and the United States:

(*a*) Convention of April 11th, 1908, respecting Fisheries in the United States and Canada, signed at Washington.

(*b*) Convention of October 20th, 1818, signed in London, regarding Fishing Disputes.

(*c*) North Atlantic Fisheries: Arbitration. January 27th, 1909.

(*d*) Treaty: Preservation of Fur-Seals, Washington, February 7th, 1911.

(*e*) Agreement: North Atlantic Fisheries. July 20th, 1912.

(*f*) Treaty with Canada for Preservation of Halibut Fishery. Washington, October 21st, 1924.

16. Treaty: Great Britain-United States, Behring Sea Arbitration, February 29th, 1892; and Convention, February 8th, 1896.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

# REPORT ON EXTRADITION

*adopted by the Committee at its Second Session, held in January 1926*

The Committee has the following terms of reference: [1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

At its first session the Committee appointed a Sub-Committee, consisting of Mr. BRIERLY as Rapporteur and M. DE VISSCHER, to consider:

"Whether there are problems connected with extradition which it would be desirable to regulate by way of general conventions and, if so, what these problems are and what solutions should be given to them."

After a close study of the report drawn up by Mr. Brierly and the observations thereon submitted by M. De Visscher, the Committee considered that certain questions connected with extradition were susceptible of being dealt with by way of a general international convention. These questions are the following:

1. The question whether and in what conditions a third State ought to allow a person who is being extradited to be transported across its territory.

2. The question which of two States both seeking extradition of the same person from a third State ought to have priority over the other.

3. The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offence other than that for which he was extradited and on a State's right to extradite to a third State a person who has been delivered to it by way of extradition.

4. The question as to the right of adjourning extradition when the person in question has been charged or convicted, in the country where he is, for another crime.

[1] See the Assembly Resolution of September 22nd, 1924.

5. The question of confirming the generally recognised rule by which the expenses of extradition should be entirely borne by the claimant State.

The discussion in the Committee of the other questions mentioned in the report led it to the conclusion that, although their solution by international agreement appeared very desirable, the difficulties in the way were too great for such solution to be realisable in the near future.

In these circumstances, and in view of the predominant importance of the last-mentioned questions, the Committee, while taking into full account the reasons which in the opinion of many important authorities tell in favour of a general international regulation of extradition, has refrained from including in its provisional list even the questions which in themselves were found susceptible of being treated in a convention.

On the other hand, the Committee decided to communicate to the Governments Mr. Brierly's report and the attached observations of M. De Visscher in order to enable them to profit by the light thrown on the matter in these documents and to form a clearer view of the position.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

## ANNEX

## REPORT OF THE SUB-COMMITTEE

Mr. BRIERLY, *Rapporteur.*
M. DE VISSCHER.

*Whether there are problems connected with extradition which it would be desirable to regulate by way of general conventions and, if so, what these problems are and what solutions should be given to them.*

### I. REPORT BY MR. BRIERLY

The Sub-Committee believes that it is unnecessary for it to consider what, if any, are the rules of customary International Law in the matter of extradition. Interesting doctrinal controversies exist on that question; but actually extradition is carried out in modern times, with rare exceptions, on conditions which are regulated by treaties. The great majority of such treaties are bilateral, and their total number is very large indeed. A multilateral extradition treaty, however, signed in 1923, exists between the States of Central America; and another, between twelve American States, including the United States, was signed in 1902, but has not been ratified. The

question therefore which its terms of reference present for the consideration of the Sub-Committee is in effect the desirability or otherwise of regulating by a general convention all or some of the matters at present regulated by separate extradition treaties; and this question can best be answered by a short examination of the chief matters which are ordinarily dealt with in the existing treaties, with a view to seeing, firstly, how far uniformity of practice already exists, and, secondly, where such uniformity does not exist, whether the differences of practice appear to be based on differences of policy which are unlikely to be reconciled, or are likely to admit of reduction to a uniform rule.

It is proposed to treat the matter under the following heads:

I. Extraditable persons;
II. Extradition crimes;
III. Procedure of extradition;
IV. Miscellaneous provisions.

I. *Extraditable Persons.*

It is believed to be the uniform practice to regard as extraditable nationals of the State demanding extradition and nationals of third States. But an important difference exists with regard to the extraditability or otherwise of nationals of the State of asylum. The majority of States decline to extradite their own nationals. Great Britain and the United States, regarding criminal jurisdiction as essentially territorial, are prepared in principle to do so; actually, the treaties of these two States contain varying provisions on this point, doubtless on account of the difficulty of securing reciprocity for their policy. It is, however, not easy to justify in principle the policy of refusing to extradite nationals. The theory that a State should try its own nationals for crimes wherever committed fails as a justification for two reasons: (*a*) Because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence; and (*b*) because the argument cannot have any application to a national who has escaped to his own country *after conviction* in a foreign country, since on general principles of justice such a person may not be tried again for the same offence. If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign State, that would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons. But whatever the respective merits of these different views as to the extraditability of nationals may be, and even if the States should be unwilling to adopt a uniform practice on the point, we do not think that this question of itself creates any insuperable bar to a general convention on extradition, since the divergent policies might be reconciled by the insertion of an optional clause under which those States which were prepared to sur-

render their own nationals would agree to do so, either on terms of reciprocity or on such other terms as they might choose to specify in adhering to the clause.

II. *Extradition Crimes.*

The ordinary practice is to enumerate these in each treaty. The details of such enumerations are very various, but in most treaties extradition is reserved for the more serious crimes. States have an obvious interest in limiting their lists of extradition crimes, since at the best the procedure of extradition is cumbrous and expensive.

We think there are serious difficulties in constructing a single list of extradition crimes for insertion in a general convention on extradition:

(*a*) Because the needs of States are in this respect not uniform. For example, as between two neighbouring States the interests of justice may well make it necessary that extradition should be mutually granted for relatively slight offences; it is easy for a criminal to cross a single land frontier and it is a comparatively simple and inexpensive process to recover him from a neighbouring State. These are reasons which clearly justify a differentiation in this matter between States on geographical grounds.

(*b*) Because a uniform list of extradition crimes is hardly possible without uniformity of criminal law, which does not exist. On the contrary, the detailed definitions, even of crimes which are generally similar, differ in different systems of law, and in criminal, even more than in any other branch of law, a strict adherence to the letter of a definition is necessary in justice to the accused person. It is not permissible to employ a free interpretation. The difficulties caused by the existing absence of uniformity in the definition of crimes can be met fairly satisfactorily in a bilateral treaty, in which it is necessary to take into account only two systems of law; they would be almost insuperable in a general convention. On the whole, we consider that, if the States should decide to adopt a general convention on extradition, the most convenient method of dealing with this particular matter would be to grant extradition for any act punishable with a certain prescribed severity either in the two States concerned or in the State demanding extradition, and not to attempt a detailed list of extradition crimes. This would involve a somewhat drastic breach with existing practice, but we observe that this is the method adopted in the treaty of the Central American States referred to above.

A further difficulty under this heading arises out of the practice, all but universal in modern extradition treaties, of excluding from extradition "political crimes." We think it certain that this exclusion would have to be made in any general convention, but we feel grave doubts as to whether it would be possible to secure any agreed definition of "political" in this connection. It is not necessary here to discuss in detail the attempts that have been made to define this conception, because we doubt whether any of them

has been satisfactory, and certainly none of them has secured general acceptance. In practice, what seems to happen is that it is left to the State on which the demand for extradition is made to decide whether in any given case an alleged crime is "political" or not. If, as we anticipate, it should prove impossible to reach an agreed definition, there would seem to be no reason why this practice should not continue to be followed under a general convention.

Existing treaties generally require that the act for which extradition is claimed should be punishable by the law of both the States concerned. In this connection the effect, if any, to be allowed to prescription is sometimes dealt with. It would probably not be difficult to arrive at uniformity on these points.

III. *Procedure of Extradition.*

A request for extradition is generally made and answered through the diplomatic channels. Some treaties allow more informal demands, and there would seem to be an obvious advantage in this plan, at any rate in treaties providing for extradition as between colonial dependencies far removed from their respective central Governments. It is also common, and it appears almost necessary, to provide for the provisional detention of a fugitive pending a formal demand for his extradition. We do not anticipate serious differences of view on these points.

But a more difficult question is the following. There exists considerable difference in the procedure followed by States in forming their decision as to whether a demand for extradition should or should not be acceded to. The difference turns on a difference of view as to the respective functions of the judicial and the executive organs in passing upon the demand. At first sight, indeed, it might appear that since the answer, however it may be arrived at, will be returned through the diplomatic channel, the method of arriving at it would be a purely domestic matter to be determined by the municipal law of the State of asylum, and a matter of indifference so far as the provisions of the extradition treaty are concerned. This, however, is not so, since the method which the State of asylum thinks fit to use in arriving at its decision on a request for extradition necessarily affects the nature and amount of the information which the State asking for extradition must supply; and it is essential that the treaty should specify in sufficient detail the documents or other information by which a demand should be supported. It is common ground, for instance, that evidence of the identity of the accused, and of the nature of the act charged against him, should be supplied. Certain minor differences exist in relation to these points; but a more important difference relates to the question of whether the demand should be supported by evidence of probable guilt or merely of accusation. The practice of Great Britain and the United States is not to extradite a person merely on proof that he is *accused* of an extradition crime, but to require the production of such evidence as would justify his being brought to trial in the country of asylum

if it were alleged that he had committed the crime of which he is accused in that country. Certain critics have attributed this greater strictness of practice to a lack of confidence in these countries in the justice of others; but it appears rather to be based on the theory that to extradite a person for trial abroad is an act essentially similar to that of committing him for trial at home, and that the accused has a right to the same safeguards in the two cases. But undoubtedly this practice adds to the expense and delay of extradition proceedings. Although superficially this difference is one only of procedure, we believe that it might be difficult to secure the adoption of a uniform rule on the matter.

IV. *Miscellaneous Provisions.*

The object of this report is merely to offer some considerations on the more important matters connected with extradition, and it does not attempt to exhaust all the matters which would have to be made the object of detailed discussion in a body attempting to draft a general convention on the subject. One or two further matters may, however, be mentioned.

1. Difficulties have arisen from time to time in reference to the transit across the territory of a third State of a person whose extradition has been granted. It has been thought that such third State could not properly permit the transit unless the conditions upon which it would itself have granted the extradition are satisfied. We think that the reasonable course is for the third State to allow the transit over its territory on being satisfied that the extradition has been duly granted by the State of asylum. This is a provision, however, which can hardly be laid down except by a general convention on extradition.

2. A uniform rule is also desirable, and should not be difficult to achieve, on the question of priority as between two States, each claiming the extradition of the same person from a third State. If one of these is the State of which he is a national and the other that in which his alleged crime was committed, it would seem proper that the claim of the latter should be preferred. Indeed, it would be a matter for consideration, which the treaty should determine, whether extradition should in any case be granted except to the State on whose territory a crime is alleged to have been committed. But it may be that the same person is charged with two or more crimes committed in different States, and in that event it would be desirable to determine which claim should be preferred, *e.g.*, whether that of the State whose claim is first received, or that of the State alleging the more serious crime. This is a point which also can hardly be satisfactorily dealt with except in a general convention.

3. A general practice exists of limiting the right to try a person extradited to his trial for the particular crime for which his extradition was claimed. The details of the limitation vary; some treaties, for instance, allow trial for any crime on the list of extradition crimes. The right to re-extradite to a third State a person placed in the power of a State by extradition raises a

somewhat similar point. On both an agreed provision would seem to be not impracticable.

4. Other minor provisions which do not appear likely to raise differences of view, and which it is sufficient therefore merely to mention here, are the right to defer extradition if the accused person is accused of, or has been condemned for, another crime in the country of asylum and the practice that the expenses of extradition should be paid by the State demanding it.

*Conclusions*

We believe that on a large number of questions connected with extradition there already exists practical uniformity in the practice of States, and that in certain others the differences which exist are not founded on any seriously divergent policies and might be capable of reconciliation. But undoubtedly there are still other questions upon which States appear to hold strongly opposed views, the existence of which renders a single comprehensive convention, regulating the whole practice of extradition for all States, unlikely of achievement. Whether a general convention dealing only with part of the subject of extradition would be desirable on the assumption that one dealing with the whole of the subject is impracticable, seems to be a matter for serious consideration. It would be open to the obvious criticism that it added one more to the number of extradition treaties which it is the object of a codifying process to reduce, since a partial general convention would of course require to be supplemented by special bilateral conventions on the points on which general agreement had proved impossible; but, on the other hand, certain of the differences which at present appear to be formidable obstacles might, on a general discussion, prove less serious.

It is perhaps unnecessary for us to remind the Committee that extradition between States calls for a certain degree of mutual confidence in each other's judicial institutions, and that a general convention on the subject is only possible on the assumption that each State is willing to accord equal treatment to every other. Whether or not these conditions are satisfied is a matter of prime political importance, but it is not one upon which we are able to form an opinion.

## II. OBSERVATIONS BY M. DE VISSCHER ON THE REPORT BY MR. BRIERLY

[*Translation.*]

I am generally in agreement with the views expressed by Mr. Brierly in his report on extradition. In particular I feel: (1) that there are a certain number of questions which arise in practice at present in connection with extradition, which it would seem possible to attempt to deal with by way of a general international convention analogous to the Montevideo Treaty of January 23rd, 1889; (2) that other questions are not suitable for such treatment; (3) and, finally, that the existence of this latter class of question does not, at

least at first sight, furnish a sufficient reason for discouraging Governments from undertaking measures of codification limited to those points upon which an agreement in the form of a convention seems already to be possible and desirable.

*Observations on Various Questions raised in the Report*

At present, in the first phase of our Committee's work, there can be no question of submitting a detailed study of the various points touched on in the report, still less of formulating final proposals as a basis for discussion at an international conference. The following observations are thought, however, to be of some interest from the point of view of the subsequent development of our investigations.

I. *Extradition of Nationals.*

Like the Rapporteur, I am, in principle, of opinion that the authorities of the country where an offence has been committed are the authorities best qualified to punish it, and that, in this respect, they possess a natural jurisdiction which it would be desirable to see recognised as widely as possible. Nevertheless, in practice, one has to take account, not merely of the strong repugnance which the great majority of States display against handing over their nationals to a foreign country, but also of the reasons which explain this feeling and which, as a matter of fact, vary considerably from country to country. For example, there is no doubt that a country's attitude in this matter will always be influenced by the amount of confidence which it feels in the administration of justice in a particular other country and—despite all theoretical considerations—one cannot be surprised that a country should be more exacting in its appreciation when it is called on to hand over one of its own nationals than when the subject of extradition is a foreigner. It might be useful, as Mr. Brierly suggests, to provide for the insertion of an optional clause. Thus one could conceive the insertion of a general clause declaring that extradition of nationals was allowable unless the contrary was provided. There are already various treaties containing clauses to this effect; this is the case, for example, with general extradition treaties concluded by France.

Possibly, a further step in this direction might be made. Whether or not one is in favour or opposed to extradition of nationals, agreement exists on one point, namely, that it is inadmissible that refusal to extradite nationals should confer immunity on them. In other words, a State whose law does not permit extradition of its nationals ought to be obliged itself to punish offences committed by its subjects abroad, when they are such as would justify a demand for extradition. This consideration has led to the provision which is to be found, for example, in the Belgian Law of 1878 (Article 8), under which persons who have committed abroad a crime or minor offence covered by an extradition law of their country of origin ought to be prosecuted in the latter country, either on complaint by the injured party or on official notification received from the foreign authorities. This provision establishes a direct

connection between the rule of non-extraditability and extension of criminal competence to offences committed outside the territory. The latter extension fills the gap created by the rule of non-extraditability of nationals, a refusal to extradite on the ground of a person's nationality being counterbalanced by his prosecution under his national law.

Might not the attempt be made to establish in a general convention a formula imposing the above obligation on all States which were unwilling to accept the extradition of their nationals, whether for the reason that they adhere to the rule of non-extraditability of nationals, or for the reason that they only allow extradition of nationals as a measure to be taken at their own option?

II. *Extradition Crimes.*

I share the Rapporteur's views as to the impossibility of reaching general agreement on a list of extraditable offences. Such agreement is impossible, both because of the diversity of interests of the various States, and because of the divergencies between their penal laws. To find the full measure of the difficulty it is enough to recollect the difficulties which are experienced even between States between which particular treaties of extradition exist, either from the divergence of their respective laws, or from modifications introduced therein subsequent to the treaties.

Like Mr. Brierly, I believe that the only way of obtaining a certain degree of agreement would be to adopt as a criterion the notion of a minimum penalty. Extradition would only be made obligatory for offences which are subject to a definite minimum penalty, both in the State requesting and in the State requested to grant extradition. In other cases the extradition would be merely optional. This is the system followed in several extradition treaties concluded by France. Moreover, it is possible to quote several legislative systems which subordinate extradition to the existence of a minimum penalty in the country requested to extradite. The proposed criterion is therefore one which is already, to some extent, established in actual law.

The difficulty connected with *political offences* arises mainly from the fact that, in connection with extradition, an exceptional extension is given to the conception "political offence." Ordinarily, by a political offence is meant a purely political offence, *i.e.*, one not accompanied by any offence against the ordinary law; but in connection with extradition the conception is frequently extended to cover *ancillary* offences, *i.e.*, offences against the ordinary law connected with political acts or events. It is, as a matter of fact, the State requested to grant extradition which has the sovereign right of appreciating, according to the circumstances of the case, whether the act in virtue of which extradition is requested has or has not a political character (Resolution of the Institute of International Law, Oxford session, 1880). This unilateral right of appreciating the circumstances of the case, which necessarily implies the right of appreciating the motives involved, has not infrequently created difficulties between States. It is difficult, nevertheless, to envisage any other

system even if there were a general extradition convention. Indeed, it might even be valuable to insert in such a convention a stipulation legitimising existing practice on the point, so as to prevent recurrence of the difficulties which have arisen.

III. *Extradition and Criminal Jurisdiction.*

According to the generally received theory and practice, a State does not hand over persons justiciable by it. In other words, extradition should be refused when the facts on which the request for extradition is based are, on any ground whatever, punishable under the jurisdiction of the State requested to extradite. In this case the refusal to extradite arises from a concurrence of criminal jurisdiction. The principle is not, however, universally accepted. It appears that in England and the United States the existence of jurisdiction in the English or American courts would not, in itself, be an obstacle to extradition, although in England the courts may in such case declare that, having regard to the circumstances, it is preferable for the person whose extradition is demanded to be prosecuted before the British courts.

Leaving on one side the case where the person whose extradition is demanded is a national of the State requested to extradite him, and the latter's criminal jurisdiction over him is accordingly based upon his personal allegiance, might it not be well to try to settle the scope of the principle more precisely, for example: (*a*) to establish in a general convention the rule that extradition may always legitimately be refused when the acts on which the request is founded were committed in the territory of the State requested to extradite (predominant jurisdiction founded on the principle of territoriality); (*b*) and on the contrary to stipulate that, when the acts on which the demand for extradition is based were committed in the territory of the State requesting extradition, extradition may not be refused on the mere ground of concurrent jurisdiction, unless the said acts have already, in the State requested to extradite, been made the subject either of a final judgment or of a prosecution already commenced (this is, for example, the principle contained in the Swiss Federal Law of January 22nd, 1892).

IV. *Miscellaneous Provisions.*

Like Mr. Brierly, I consider that agreement is obtainable and desirable on various questions mentioned in Section IV (Miscellaneous Provisions). The full scope of the principle referred to in No. III would require to be made more explicit. Differences of view exist as to its consequences (for example as to the lawfulness of a prosecution implying restraint of the person) and as to the exceptions to the principle (such as may result, for example, either from an agreement between the State which has accorded and that which has obtained extradition, or from a renunciation by the person extradited of restrictive conditions subject to which he was extradited).

Ghent, November 17th, 1925.

Ch. De Visscher.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

# CRIMINAL COMPETENCE OF STATES IN RESPECT OF OFFENCES COMMITTED OUTSIDE THEIR TERRITORY

*Report adopted by the Committee at its Second Session, held in January 1926*

The Committee has the following terms of reference:[1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

At its first session the Committee appointed a Sub-Committee, consisting of Mr. Brierly as Rapporteur and M. De Visscher, to enquire:

"Whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories and, if so, what these principles should be."

After a close study of the special questions to which attention is called in the report drawn up by Mr. Brierly, and the observations thereon submitted by M. De Visscher, the Committee has found that international regulation of these questions by way of a general convention, although desirable, would encounter grave political and other obstacles.

In these circumstances, the Committee, which has also taken into consideration the close connection between the present subject and the subject of extradition, has refrained from placing the question set out above on its provisional list. On the other hand, the Committee has decided to communicate to the Governments Mr. Brierly's report and the attached observations by M. De Visscher in order to give them the opportunity of profiting by the light thrown on the subject in this report and annex.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. Hammarskjöld,
*Chairman of the Committee of Experts.*
Van Hamel,
*Director of the Legal Section of the Secretariat.*

[1] See Assembly Resolution of September 22nd, 1924.

## ANNEX

## REPORT OF THE SUB-COMMITTEE

Mr. BRIERLY, *Rapporteur.*
M. DE VISSCHER.

*Whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories and, if so, what these principles should be.*

### I. REPORT BY MR. BRIERLY

1. The terms of reference to your Sub-Committee do not limit our consideration of the criminal competence of States in regard to offences committed outside their territories to offences committed by non-nationals. We apprehend, however, that there can be no question of the competence of a State in respect of the offences of its own nationals, wherever these may be committed; and that it is solely a matter for the determination of each State whether it will assume, and in what cases it will exercise, jurisdiction over offences committed by its own nationals abroad. We believe, further, that no good purpose would be served by suggesting that a principle so well established should be embodied in a convention. We propose, therefore, to limit our observations to the criminal competence of States in regard to offences committed outside their territories by persons other than their own nationals.

2. Such offences may be committed either within the territory of another State or in a place which is not within the territory of any State. We believe that the Committee in drafting our terms of reference desired us to consider chiefly, if not solely, the former class of offences. In any case, we should not recommend the latter class as suitable for conventional regulation. It includes a number of cases which have little in common except that the place in which the offence is committed is outside the territory of every State; for example, a State may apply its criminal law to offences on the high seas on board ships flying its flag; piracy is justiciable by any State, and certain treaties exist under which one State consents to the assumption of jurisdiction over its nationals by another State in specified cases, *e.g.*, the treaties recently negotiated by the United States for the prevention of the introduction of intoxicating liquors into its territory. These examples are sufficient to make it clear that no single principle underlies the cases in which a State may assume jurisdiction over non-nationals for offences committed outside the territory of any State. We shall therefore confine our remarks to the question of jurisdiction over offences committed within the territory of another State.

3. A diversity of practice exists in this matter. Great Britain, the United States, Denmark aud Portugal do not themselves assume any jurisdiction over such offences when committed by non-nationals, and the two former

States, if not all the four States named, would appear to hold the view that by international law no State is entitled to assume such jurisdiction. Their theory of criminal competence is on this point strictly territorial. On the other hand, the practice of most other States departs from the territorial principle to a greater or less extent.

The following summary of the practices prevailing among such States is taken from a recent article in the *British Year-Book of International Law*, "The Exercise of Criminal Jurisdiction over Foreigners," by Mr. W. E. BECKETT. After stating that Mexico, Greece, Russia, Brazil and China assume jurisdiction in case of offences of a certain degree of seriousness which are criminal both by their own law and by that of the *lex loci delicti commissi*, he says:

> "Italy has somewhat similar provisions in her code with respect to crimes against Italians abroad, but this jurisdiction seems to be looked upon as a reserve or extraordinary jurisdiction, for it is provided that, except in the case of offences committed within three miles of the frontier, it shall only be exercised if and when an offer of extradition has been made to the State in which the crime was committed and has been refused.
>
> "Norway and Sweden have similar provisions, but subject to the consent of the executive to the proceedings. . . . Austria, Hungary, Italy and the Argentine make crimes (felonies, not misdemeanours) committed by foreigners abroad, whether against their nationals or not, justiciable by their tribunals if the criminal enters the country, provided that extradition has been offered to and refused by the State possessing territorial jurisdiction, though, in the case of Hungary, proceedings will only be taken on the authority of the Minister of Justice. . . .
>
> "Again, France, Germany, Austria, Belgium, Holland, Hungary, Italy, Norway, Russia, Sweden, Greece, Brazil, Spain, Switzerland, Japan and Chile all have provisions giving their Courts power to punish aliens for acts committed abroad which are directed against the safety of the State or its financial credit. These provisions appear as exceptions to the general principle of strict territorial jurisdiction which is enshrined in the codes of most of these countries."

It is clear, therefore, that the practice of States is far from uniform. Nor is it easy, except in the case of those States which maintain the territorial theory, to infer from the practice adopted by a State the theory upon which it bases its assumption of jurisdiction, since we cannot safely argue from the fact that a State assumes jurisdiction only in certain cases that it regards those cases as the only ones in which the assumption of jurisdiction would be legitimate. It would, however, appear that there are few, if any, States which would maintain the view that international law leaves an absolute

discretion in this matter to every State. Most States, if not all, would appear to regard the territorial basis of jurisdiction as the normal rule, and the question of real doubt is whether international law permits any, and if so, what, exceptions from it. We feel assured that any conventional regulation of the matter would necessarily have to be based on this assumption.

Before we consider some of the exceptions from the territorial theory which are actually asserted by States, it is convenient to notice that even those States which deny the legitimacy of exceptions allow that in certain cases a crime may be committed *within* the territory of a State and therefore be justiciable by its criminal Courts, even though the person committing it is physically outside the territory. An obvious illustration would be that of a man who should fire a gun across a frontier and kill another man in a neighbouring State, or, to take a case in which extradition to Germany was actually granted by Great Britain, a man may obtain money by false pretences by means of a letter posted in Great Britain to a recipient in Germany. Mr. John Bassett Moore has called the jurisdiction of Germany in such a case an objective territorial jurisdiction and that of Great Britain a subjective territorial jurisdiction. The recognition of an objective territorial jurisdiction by States which maintain the territorial theory without expressly admitting any exceptions from it clearly reduces very considerably the extent of the difference between the view of such States and that of those which claim that the territorial theory is subject to exceptions.

The exception from the territorial theory most commonly claimed is that in favour of jurisdiction over crimes against the security or credit of a State. There are arguments of great force both in favour of and against the admissibility of this exceptional jurisdiction. On the one hand, it may be said that it relates to a very special class of crimes, the consequences of which may be of the utmost gravity to the State against which they are directed. Further, it would often happen that the acts in question would not contravene the *lex loci delicti commissi*, so that unless this exception from the territorial theory is admissible they would often escape punishment altogether. The territorial basis of jurisdiction, it may be urged, is not a mere dogma; it is justified normally because it is convenient that crimes should be dealt with by the State whose social order they affect most closely and this in general is the State on whose territory they are committed; in this special class of crimes it is not the territorial State that is primarily affected, even if that State is affected at all, but rather the State whose security is attacked; here, therefore, the territorial basis of criminal jurisdiction should admit of an exception on the principle of *cessante ratione legis, cessat lex ipsa*. There is force in these arguments, but there are also serious objections to the conclusion to which they lead. In the first place, there seems to be a certain anomaly in submitting to a non-territorial jurisdiction the very class of crimes which States by common consent exclude from extradition. But a more serious objection is this. Every State is at present regarded as the

judge of what endangers its own security. A State, for instance, may regard criticism of its Government in the Press as dangerous; if it chooses to impose special restrictions on its own Press or even on the journalistic activities of its own nationals in other countries, that is no affair of other States. But is such a State entitled to apply, in so far as it has the ability, its repressive Press laws to non-nationals who may venture to criticise it in the Press of other countries? Or, again, a State may, perhaps quite justly, be convinced that speculation in its currency is an attack on its credit; but is it therefore justified in taking advantage of this alleged exception from the territorial basis of jurisdiction to extend its criminal law to non-nationals carrying on their business in the money markets of their own countries? It is difficult to believe that any State would tolerate the punishment of its own nationals by another State for acts of this kind; yet if the exception is allowed in the form in which it is usually claimed it clearly renders such punishment legitimate. It is, of course, perfectly true that States do not in fact use their non-territorial jurisdiction in the ways we have suggested as possible, but we do not think that that consideration weakens the force of the objection. If it is agreed that such an abuse of the non-territorial jurisdiction would be inadmissible, there would seem to be no reason why that jurisdiction, if it is to be accepted at all, should not be so defined as to exclude its extension to such cases as those that we have mentioned.

It will have been observed from the summary of the practice of States given earlier in this report that certain States depart from the territorial basis in other cases besides those of crimes endangering their security, *e.g.*, by asserting a non-territorial jurisdiction when a crime has been committed abroad against their nationals, or when extradition has been offered to and refused by the State on whose territory the crime was committed. It does not seem to us to be necessary to consider the merits of these claims in detail in this report, since we are of opinion that the possibility of a conventional regulation of the whole matter will depend, not on the merits of this or that case in which a non-territorial jurisdiction is at present claimed, but on the prior and more fundamental question whether the territorial basis is to admit of any exception at all. It is clear that the crux of the problem lies in the divergence of view between those States which do and those which do not allow the legitimacy of such exceptions, and that we have to ask ourselves whether the Committee would be justified in hoping for a possible reconciliation between these two groups of States.

Such a reconciliation could be brought about either by one group of States abandoning its own view and accepting that of the other, or by both groups adopting some intermediate principle; but it occurs to us as possible that the theory of an objective territorial jurisdiction to which we have referred above might assist in bridging the gap between the two views. We do not, of course, suggest that on that theory a State could assume jurisdiction over *all* those acts which an exception from the territorial basis in favour of crimes

against the security of a State would bring within its competence, but it could do so over *many* of those acts, and probably over those which most closely affect its interests. The objective territorial theory is well defined in the following words from Professor C. C. HYDE's *International Law:* "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain;" and it clearly requires a closer causal connection between the act in one country and its effects in another than is required by the theory of an express non-territorial jurisdiction over acts endangering the security of a State. The objective territorial theory would not, of course, cover the other exceptions from the territorial theory, which, as has been pointed out above, are at present claimed by certain States.

Alternatively, if it should be thought that the objective territorial theory does not go far enough to meet the views of those States—and they are a majority—which claim to a greater or less degree a definitely non-territorial jurisdiction, an intermediate principle might possibly be found if such States should be willing to consent to more particular definition of the acts in respect of which non-territorial jurisdiction is to be exercisable. Such a compromise would, of course, involve that States, instead of reserving to themselves the right to decide for the purposes of their non-territorial jurisdiction what acts endanger their security, would accept an agreed and uniform list in which such acts would be specified. We put forward these suggestions as conceivable means of overcoming a difficulty which would otherwise appear to be an insuperable bar to any convention on the subject, but we are very conscious that any conventional settlement of the matter would demand sacrifices from one or from both groups of States in a matter which is clearly one of great delicacy. To a State adhering strictly to the territorial basis of jurisdiction, the assumption by other States of competence to deal with acts committed in its own territory easily appears as an invasion of its sovereign rights, whilst to a State claiming an exceptional non-territorial jurisdiction over acts endangering its security the suggestion that this jurisdiction should be curtailed may appear to throw doubt on its right of self-defence. Your Sub-Committee is not qualified to express any opinion as to the likelihood of a compromise on such lines as we have suggested being found acceptable to either group of States.

In conclusion, we desire to call the attention of the Committee to the resolutions of the Institute of International Law on this matter in 1883, although with great respect we do not ourselves believe that a settlement on the lines which commended themselves to the Institute would be desirable. The Institute adopted the territorial basis of competence in an extreme form, going so far as to say: "La justice pénale d'un pays dans le territoire duquel se réalisent ou devaient se réaliser, selon l'intention du coupable, les effets de son activité, n'est pas compétente à raison de ces effets seuls;" but it ad-

mitted the following exception: "Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu."

(*Signed*) J. L. BRIERLY, *Rapporteur.*

### II. OBSERVATIONS BY M. DE VISSCHER

[*Translation.*]

I. I agree with Mr. Brierly that we cannot contemplate inserting rules in an international convention which would tend to restrict the right of a State to institute prosecutions in respect of acts committed abroad by its nationals. I consider, however, that it might be desirable to stipulate that a State which refuses to surrender its nationals in respect of offences committed by them abroad of the kind mentioned in the extradition treaties should itself be required to put them on their trial (see on this point my observations concerning the report on Extradition).

II. The essential point seems to me to have been stated with great precision by the Rapporteur. Territorial competence (*lex loci delicti commissi*) must in the case of offences committed *by foreigners* be regarded as the rule. The reason for this seems to me to lie in the fact that it is generally in the country where the offence has been committed that the disturbance caused thereby to social order is the most serious.

Positive law contains two exceptions to this principle which are of serious importance: the one, which is based upon the nature of the interests prejudiced, relates to offences against the security or credit of the State; the other, which is based on the nationality of the victim, relates to offences committed against nationals.

The first exception figures in many legislative systems and has sound reasons to justify it. The second is less generally admitted and is much more disputable.

In the case of offences directed against the security or credit of a State, it is hard to conceive of any law competent to repress them other than that of the State which is menaced. Their repression in most cases is of no interest to the State on whose territory the acts are committed; it may even happen that the consequences deriving from them are a cause of profit to it. In any case, a State cannot abandon to another the task of dealing with and punishing acts susceptible of causing injury to its essential interests. We may add that, even if the cases in which these dispositions are applied are in practice rare, it would none the less be very difficult to induce States to give them up.

No such good reasons can be urged in favour of the second exception to the principle of territorial competence, namely, that which is based upon the nationality of the victim. On the one hand, it can hardly be maintained

that the general interests of a State have been attacked merely because one of its nationals has been the victim of an offence in a foreign country. On the other hand, the criminal law of the country where the offence has been committed owes foreigners such protection as will in general ensure the repression of such offences. The exception would therefore only be justified if one or other of these two considerations were invalid. This might be the case if the victim were the holder of a public office or, again, if the country where the offence was committed did not possess any criminal law worthy of the name.

It would therefore seem to us—at any rate, at first sight—that in an attempt to lay down general rules concessions ought mainly to be made by those States which adhere to the system of strict territoriality in respect of offences directed against the security and credit of the State, while concessions of an opposite kind would be required from States which apply more or less numerous derogations from this system in respect of offences against nationals.

Moreover, may it not be said of offences against the security or credit of a State that they are acts which, although they are committed in foreign territory, tend as a direct consequence to undermine the institutions of the State within the limits of its own territory? The objective territorial theory described in the report might be applied here, although it is clear that serious difficulty is likely to arise in determining the more or less immediate degree of causal connection which must exist between acts committed abroad and their consequences in the country itself.

III. As the report points out, an understanding could no doubt only be arrived at at the cost of mutual concessions which would involve the abandonment of conceptions which have been adopted or of practices which have been followed hitherto. Although Governments alone can decide how far they are able to advance in this direction, a committee of jurisconsults may suggest certain bases of agreement which appear to it likely to restrict the sphere of the conflicts which now arise in respect of criminal competence.

Ghent, November 24th, 1925.

(*Signed*) Charles De Visscher.

## LEAGUE OF NATIONS

### Committee of Experts for the Progressive Codification of International Law

REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS

*adopted by the Committee at its Second Session, held in January 1926*

## LEGAL STATUS OF GOVERNMENT SHIPS EMPLOYED IN COMMERCE

The Committee is acting under the following terms of reference: [1]

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In execution of the above terms of reference, the Committee appointed a Sub-Committee:

"To enquire into the legal status of Government ships employed in commerce with a view to the solution by way of conventions of the problems raised thereby."

The Sub-Committee, which was composed of M. DE MAGALHAES as Rapporteur and Mr. BRIERLY, submitted to the Committee a report setting out the reasons in support of its conclusion that the subject is one the regulation of which by international agreement is at the present moment desirable and realisable. This report has been examined by the Committee.

The Committee, while in agreement with the above conclusion of the Sub-Committee, observes that the subject has already been studied at two international conferences called by the International Maritime Committee and held respectively at Gothenburg and Genoa, and that a draft convention has been submitted to the Government of Belgium with the request that that Government will call a diplomatic conference in order to prepare a convention for adoption and signature by the States, and that the Belgian Government has this request under examination.

Considering, in consequence, that, if the Belgian Government should give effect to the request made to it, communication of the subject to the various Governments in accordance with the Assembly's resolution of September

[1] See Assembly Resolution of September 22nd, 1924.

22nd, 1924, might appear superfluous, the Committee has resolved to transmit its Sub-Committee's report to the Council with an expression of the opinion of the Committee that the subject is one which it is desirable and presently realisable to regulate by international agreement, either in the manner proposed by the International Maritime Committee or, if that Committee's initiative remains without effect, in such other manner as the Council may deem appropriate.

The Committee feels it desirable to add that, in adopting the above-mentioned conclusion of the Sub-Committee's report, it does not pronounce either for or against the solutions proposed for special problems by the Sub-Committee. At the present stage of its work, it is not for the Committee to put forward conclusions of this nature. Its task is rather that of directing attention to certain subjects of international law the regulation of which by international agreement appears to be desirable and realisable.

The Sub-Committee's report, with three appendices, is attached to the present communication.

Geneva, January 29th, 1926.

(*Signed*) Hj. L. HAMMARSKJÖLD,
*Chairman of the Committee of Experts.*
VAN HAMEL,
*Director of the Legal Section of the Secretariat.*

## ANNEX

## REPORT OF THE SUB-COMMITTEE

M. DE MAGALHAES, *Rapporteur.*
Mr. BRIERLY.

*Enquiry into the legal status of Government ships employed in commerce with a view to the solution by way of conventions of the problems raised thereby.*

[*Translation.*[1]]

The problem of the immunity of Government ships may to-day be regarded as one that is, in principle, capable of solution.

It is only recently that this question has been systematically and carefully explored by jurists, by writers in legal reviews and publications, by the rulings of courts, or by international conferences, but it none the less insistently calls for a solution; so much so, indeed, that we can already assume with certainty that the States are prepared to accept a decision on this subject in the immediate future.

In truth, it is not merely considerations of doctrine which render a solution of this problem advisable, and even necessary, but also, and primarily,

[1] Note.—The official English texts of the passages quoted have been used where possible; such texts are unfortunately not available to the Secretariat for the Genoa Conference.

practical considerations, and the necessity of placing a Government which engages in commerce on a footing of equality, instead of in a privileged position, in relation to other traders.

Inequalities and privileges are always displeasing and more or less objectionable, but they are particularly so in questions of law and justice.

When discrimination of this kind exists between a Government and its own subjects, it is more difficult to prevent or to remedy it, but when it occurs between a Government and the subjects of another State, the question assumes a new aspect, particularly if the State in question, while entering into competition with private undertakings, leaves the public free—as it is bound to do in most cases—to avail itself or not, as it thinks fit, of the enterprises which the Government proposes to operate.

The general problem of the immunity of Governments, heads of Governments, and of their diplomatic agents has for some time past been the subject of discussions, criticisms and even of restrictions.

Demands have long been made that a restriction should be applied in the case of ships which a Government employs in commercial work.

But since, as a fact, prior to the Great War 1914–1918, few Governments had embarked on this course, and the economic conditions were not such at that time as to place any great difficulties in the conduct of such business, the more limited problem of the immunity of Government vessels had not assumed the importance, gravity and intensiveness that it did subsequently.

The circumstances which induced certain Governments, during and after the war, to become shipowners are matters of common knowledge, as are also the poor results which they obtained, and continue to obtain, from their management of these enterprises.

Consequently, as a result of defective organisation and financial difficulties, legal disputes arose, and became more and more acute, in many countries, in regard to the liabilities incurred by Governments of other States in their capacity as owners or operators of shipping. The question was accordingly raised before the courts, which—after some very interesting discussions—gave divergent rulings. Some of these judgments recognised and upheld the immunity which had hitherto been, so to speak, an accepted doctrine of public international law, while others rejected it as having already ceased to be compatible with the new principles which ought to govern this branch of law, and as being no longer in harmony—nay, rather in conflict—with the exigencies of the modern world; others again took the view, for reasons of another kind, that a case had arisen for restricting this doctrine of immunity.

It should be pointed out that even the first group, namely, those who respected and upheld the principle of immunity, did so with reluctance and that some of them expressly stated that it was not only necessary but desirable that restrictions should be imposed by legal means.

Now, the legal processes of public international law are the treaties be-

tween different countries, and the conventions which are concluded conjointly between more or less numerous groups of countries.

As regards the theory of the subject, liberal tendencies have suddenly acquired immense force, and among the numerous representatives of different States, who have discussed the problem or given their views, there have been few to come forward in defense of immunity for Government vessels employed in commercial work.

In the international conferences in which this question appeared on the agenda, and in particular in the conferences held by the International Maritime Committee, the same tendency predominated, and the solution which appeared just and necessary was received and adopted without opposition.

A few of its supporters were indeed less sanguine and showed some doubt and concern as to the probability of its acceptance by the Governments if it attempted too much or went too far into detail.

Perhaps they were right, and though it is true that certain facts and declarations justify us even now in assuming that the Governments are themselves convinced and are prepared to accept this solution—and the attitude of the Governments of the United States of America, Great Britain and Germany is particularly significant in this connection—we shall be wise to avoid any attempts which might complicate the solution, and rest content with a satisfactory result instead of striving to attain ideal perfection.

It may therefore be said that the draft international convention [1] which was drawn up by the Gothenburg Conference in 1923 and was afterwards provisionally approved by the International Diplomatic Conference at Brussels in the same year has received universal support and is suitable for acceptance by the Governments.

We are consequently of opinion that the legal status of Government vessels employed in commercial work is a problem which it is most desirable, and quite possible, to solve by means of international agreement.

We would go further and add that, since the Gothenburg Draft Convention has been approved by the Genoa Conference, it is to be hoped that the Permanent Bureau of the International Maritime Committee will request the Belgian Government to convene the Diplomatic Conference, in order to draw up a draft convention which the States could be invited to sign.

That is not, however, in our opinion, a reason which should prevent us from submitting our report, and we consider that the Committee for the Progressive Codification of International Law should certainly express its view on this important question, and should support the action of the Belgian Government if the latter is prepared to move in the matter. If it does not see fit to do so, it will be necessary to follow the procedure laid down in the Assembly's resolution of September 22nd, 1924.

[1] French text published in the *Revue de droit maritime comparé*, Vol. IV, page 595, and in the *Bulletin du comité maritime international* No. 65 (French edition), page VI; English text in the *Bulletin of the International Maritime Committee* No. 65 (English edition), page VI.

Since many of the Governments have already signified their assent, the procedure might even be simplified by reporting direct to the Council on this question instead of first asking the opinions of the Governments.

In any case we consider that the proper performance of our task—at least as regards the principal problems involved—requires that we should state clearly the nature of the solutions adopted in the Draft Convention of the Gothenburg Conference and confirmed or amended at the Genoa Conference, and that we should add such observations and proposals as in our opinion are necessary in order that the legal status of Government vessels employed in commercial work may be laid down in a manner compatible both with the principles of law and with the economic requirements of the day, due allowance being of course made for the differences between the legal systems of the various countries.

* * *

It must be pointed out, to begin with, that the Draft is not concerned solely with State vessels, but also with State-owned cargoes and with cargoes and passengers carried by State vessels.

This extension of its scope is clearly justified; for the arguments used in connection with State-owned ships are just as applicable to the removal of the immunity which State-owned cargoes enjoy under the prevailing doctrine.

Indeed, it would be absurd to allow a State to be sued for a claim relating to one of its ships but not to allow it to be so sued for a claim relating to cargoes which it owns—especially if the cargoes are carried in those very ships.

Similarly, it would be absurd to make Government ships liable to arrest but to exempt the cargoes carried in those ships.

Moreover, there is already universal agreement on this point; the only points of difference are in regard to the cargoes which should be exempted, *i.e.*, as to what are the cargoes in respect of which the right of extra-territoriality and immunity from arrest should be maintained. That is, however, a question to which we shall return later.

The problem of the legal status of Government vessels has only been examined and discussed from the point of view of immunity, which, when all is said and done, merely covers exemption from the payment of certain taxes, port and navigation dues, as well as the right of extra-territoriality and the privilege of immunity from arrest.

But the Draft does not confine itself to proposing to put an end to the immunity of certain State vessels.

It does more, for it lays down that the ships in question, as also their cargoes and passengers, "shall be subjected, in respect of claims relating to the operation of such vessels or to such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, persons or cargoes."

It is, in fact, necessary, as was recognised in the discussions which took place at the Gothenburg Conference, that the Draft Convention should not merely confine itself to abolishing immunity, but should also legislate as to the liabilities and obligations to which States may become subject when they carry on maritime trade.

Such a provision will remove any doubts which might persist—particularly in connection with English law—as to the legal status of Government vessels employed for commercial operations.

The most important and serious aspects of the abolition of immunity are brought out in Article 2 of the Draft Convention, which lays down that:

> "Such rules and liabilities shall be enforceable by the tribunals having jurisdiction over, and by the procedure applicable to, a privately owned merchant vessel or cargo or to the owner thereof."

This provision definitely abolishes extra-territoriality and allows arrest.

* * *

The Draft contains, however, three restrictions of considerable scope:

A.—The first of these restrictions, which occurs in Article 1, provides that State vessels are to be subjected to the same rules of liability and to the same obligations as those applicable to privately owned vessels, only "*in respect of claims relating to the operation of such vessels or such cargoes;*"

B.—The second restriction, which occurs in Article 3, makes an exception as regards extra-territoriality and seizure in the case of "*ships of war and other vessels owned or operated by the State and employed only in Governmental non-commercial work*" and in the case of "*State-owned cargo carried only for purpose of Governmental non-commercial*[1] *work on vessels owned or operated by the State;*"

C.—The third restriction is to be found in Article 4, which lays down that the Convention is to be applied "*in every Contracting State in all cases where the claimant is a citizen of one of the Contracting States,* provided always that nothing in this Convention shall prevent any singular Contracting State from *settling by its own laws the rights allowed to its own citizens before its own courts.*"

## A

The first restriction—*in respect of claims relating to the operation of such vessels or such cargoes*—did not appear in the preliminary Draft of the London Conference (1922).

It was inserted at the Gothenburg Conference to meet some observations which had been submitted by the French "Association de droit maritime."

[1] This word does not appear in the French text.

The report of that Association had pointed out that, "as the Draft of the International Maritime Committee subjects State-owned ships to the same obligations and to the same liability as private-owned, we must draw the conclusion that, according to this Draft, every creditor of the State shall have the right to enforce his claim against the State by having one of the latter's vessels arrested and sold."

And, after expressing the view that "there is no reason for admitting that any creditor of the State, whatever be the origin of the claim, shall have a right to enforce his claim on a State-owned ship in virtue of the suspension of immunity which is granted for the protection of very special interests," the report suggests that "we must first of all limit to the maritime creditors the right of action and of arrest." It goes on to say: "but this first restriction is not sufficient" because "there are creditors whose claim has some relation to the maritime trade carried on by the State, but does not concern the management of the particular ship against which the process is enforced," and that "in such case a creditor ought to be treated like any common creditor, and there would be no reason for raising the immunity on his behalf."

These observations were referred to during the Conference, and, from the various opinions expressed, it seems fair to conclude that the words which have been inserted—"*in respect of claims relating to the operation of such vessels or such cargoes*"—were intended to effect the two restrictions desired by the French Association.

The Rapporteur of your Sub-Committee, who took part in the Genoa Conference, was therefore led to put forward the following observations:

> "Though it is correct, as is shown by the preliminary debates on the Draft, that the intention and effect of the restriction were that: *a vessel belonging to or operated by the State cannot be arrested except in respect of a claim relating to such vessel*, it might be inferred—having regard to the form in which this intention was expressed—not indeed that any creditor of a Government (*e.g.*, a holder of public debt bonds) could obtain the arrest of a vessel, but that a creditor for a claim relating to a vessel belonging to a given State might obtain the arrest of another vessel of the same State. (I am, of course, referring to ships which fall under the stipulation of Article 1 and not to those covered by the exception in paragraph (*a*) of Article 3; and I spoke only of the ships for the sake of simplicity, it being, of course, understood that the same arguments apply to the cargoes).
>
> "This idea was very clearly set forth in the preliminary Draft, which appeared in the above-quoted report of Professor Rippert,[1] where we read: '*by the creditors whose claims are relating to the operation of the arrested ship or to the carriage of its cargo.*' If it is desired to maintain

[1] Report submitted by the French "Association de droit maritime" to the Genoa Conference. The report which we quoted previously is that presented by the same Association to the Gothenburg Conference.

the doctrine that the abolition of extra-territoriality and the permission to arrest a vessel is to be restricted to these creditors, the above wording ought to be used in place of that which appears in Article 1 of the Draft.

"In that case, in my view, the restriction should appear, not in Article 1, but in Article 2, and we ought to accept the amendment to Article 2 which was proposed by the French Association."

That amendment has, however, already been opposed by M. Louis Franck, who contended that the restriction was not, and ought not to be, applicable to maritime creditors, since in that case they would be able to enforce their rights against all vessels and all cargoes of the debtor State, even if their claim only related to the operating of a single and specified vessel or to a single and specified cargo of the State in question.

The Conference gave its assent to this authoritative opinion.

We have no objection to offer, but we consider that the restriction ought to appear in Article 2 and not in Article 1, because it should only affect extra-territoriality and the prohibition of arrest, and not the whole range of liabilities and obligations to which a State may be subject in the conduct of maritime trade.

B

Article 3 of the Gothenburg Draft lays down that:

"In the case of:

"(*a*) Ships of war and other vessels owned or operated by the State and employed only in Governmental non-commercial work;

"(*b*) State-owned cargo carried only for purpose of Governmental non-commercial [1] work on vessels owned or operated by the State;

such liabilities shall be enforceable only by action before the competent tribunals of the State owning or operating the ship in respect of which the claim arises."

This article was the subject of prolonged discussion. In order to gain a proper insight into the observations and criticisms which were made, the doubts and difficulties to which it gives rise, and the whole scope of its application, we must approach the question methodically.

An exception is to be made for certain vessels and for certain cargoes.

For what ships ought an exception to be made? For what ships is it desired to make an exception?

Does the wording of the article correspond to the intention?

The same questions may be asked in regard to the cargoes.

Sub-paragraph (*a*) makes an exception for ships of war and other vessels owned or operated by the State and employed only in Governmental non-commercial work.

[1] This word does not appear in the French text.

As regards *ships of war*, Sir Graham Bower asked the Gothenburg Conference to define a ship of war as "a fully commissioned ship on board of which the naval code is in force," and Sir Norman Hill, who supported this proposal, said: "We want a general term which will be applicable to all nations and would not leave it to the Courts to enquire as to whether in fact a 'ship of war' means a 'fighting ship,' or whether it is a fully commissioned ship which has no power of fighting. We want to except from this liability for arrest all the ships which in the ordinary acceptation of the word belong to the fighting navy of the nation, whether they are store ships, oil carriers, colliers or whether they are the ships that Sir Graham Bower instanced, floating workshops where they take care of the submarines and torpedo boats."

Professor Berlingieri thought it would be better not to attempt any definition, since all definitions were dangerous.

Dr. Sohr argued that the definition was useless because the expression "ships of war" was supplemented by the expression "other vessels owned or operated by the State and employed only in Governmental non-commercial work." All the ships referred to by Sir Norman Hill which were not covered by the first expression would come under the second. The Chairman subsequently proposed to put both classes of vessel, which in the London draft appeared in separate paragraphs, together in the same paragraph.

The Conference unanimously adopted this proposal.

Nevertheless, at the Genoa Conference it was proposed to substitute another text for Article 3 on the lines of the draft adopted by the Imperial Economic Conference, which had added, after "ships of war," the words "State yachts, surveying vessels, hospital ships . . ."

The Conference adopted a wording which represented a compromise between the text of the draft and the above proposal, for there were differences on other points as well; however, it retained the expressions referred to.

If definitions are dangerous, enumerations are even more so, and it cannot be denied that the enumeration in the Genoa draft is incomplete. It is therefore dangerous as well as useless, because no one can dispute that all the vessels enumerated are covered either by the term "ships of war" or by the words "other vessels owned or operated by the State and employed only in Governmental non-commercial work."

It is true that the wording of the Gothenburg Draft was replaced in the text adopted, as a compromise, at Genoa by the words "*other vessels owned or operated by the State and employed in other than commercial work;*" [1] but the

[1] The provisional translation of the English text as circulated at the Genoa Conference reads: "autres bâtiments appartenant à un gouvernement ou exploités par lui et affectés exclusivement à un service autre qu'un service commercial." The original English text is as follows: "and other vessels owned or operated by the State and employed in other than commercial work." We consider that the translation adopted ought to be: "et autres navires possédés ou exploités par l'Etat, et affectés exclusivement à un service autre qu'un service commercial."

vessels in question are also covered, beyond all doubt, by this new wording.

We will not consider whether the Genoa Conference, in substituting the expression in question for the wording of the Gothenburg draft, really effected an improvement.

The Rapporteur of your Sub-Committee said at the Genoa Conference:

> "It is a wording which cannot very well be elucidated in the Convention itself. But is it the best which could be found to give expression to the idea which we all have in our minds in a more or less positive form, or could a more precise form have been devised?
>
> "The Association française de droit maritime had proposed to replace the expression in question by the words 'Public Service.' The learned Professor Rippert pressed for this alteration, but it was not accepted, because it was held that the expression 'Public Service' would have a wider meaning and because it was thought necessary to adopt a form that would combine the two ideas: 'that the work must be Governmental work' and 'that it must be non-commercial work.'
>
> "However, considering that the expression 'Public Service' is the one which has been employed in international Conventions, and that, to avoid fresh uncertainties and to assist uniformity of interpretation, it is desirable to retain the same expressions so far as possible, and considering, moreover, that the expression 'Governmental work' seems to suggest that Governmental work is something distinct from State work, the expression 'Public Service' is in my opinion to be preferred, provided that you qualify it by 'non-commercial,' thus avoiding the objections pointed out in regard to the first of the expressions suggested, while continuing to convey both the ideas referred to above.
>
> "Further, the restriction thus placed on the words 'Public Service' might be considered as a legal interpretation of these words, where they occur in previous Conventions."

Neither of these expressions was accepted; but the doubts and difficulties have not been dispelled. On the contrary, we consider that the term which has been adopted is less clear and less explicit, and we fear that the abolition of immunity will not be so extensive as, in our opinion, it ought to be.

For these reasons we consider that the words "for a commercial purpose," which were inserted at Genoa in Article 1 and which appear in the draft of the Imperial Economic Conference, ought to be omitted.

* * *

It is, however, certain that, no matter what expression may be used, there will always be doubtful points and difficulties of interpretation which can only be decided by the courts of the country in which the case is tried, in

accordance with the legal standards of that country;[1] hence we are bound to have a number of different rulings with divergent and even conflicting interpretations.

The Rapporteur of your Sub-Committee observed at Genoa:

> "The only way to mitigate this difficulty would be by adopting the proposal which M. Bischopp made at the London Conference in 1922, namely, that 'the legal controversies which may arise with regard to provisions settled by such Convention should, in order to obtain continuity and uniformity of jurisdiction, be submitted for final decision to the Permanent Court of International Justice at The Hague.'
>
> "This proposal, which was referred to by M. Van Slooten at the Gothenburg Conference, did not gain the approval of any conference (though its desirability was admitted), owing to the fear lest its importance and far-reaching character might imperil the success of the Convention.
>
> "These circumstances, which are certainly to be regretted, render me disinclined to press for the adoption of this proposal. Nevertheless, I would suggest that, if the effect of the proposed clause were limited to the subject of the Convention, this danger might perhaps be greatly mitigated, if not altogether obviated.
>
> "It would also be desirable to amend the text so as to make the recourse to the International Court—whose decisions, it may be observed, would not be binding as legal interpretations—optional, instead of compulsory, as is, or seems to be the case, under the proposal in question.'"

In view of the above considerations, Dr. Bischopp moved the following proposal:

> "The High Contracting Parties undertake, in case there should be a divergence in different countries as to the interpretation of the provisions of the present Convention, to request the Council of the League of Nations to obtain the opinion of the Permanent Court of International Justice at The Hague on the divergence in question."

[1] In the Report of the Italian Association for Maritime Law at the Genoa Conference, Professor Berlingieri gave a summary of a treatise which Professor Fedozzi had written on the Gothenburg Draft, and pointed out that the draft in question failed to provide a solution for a question of the first importance, *i.e.*, whether a judge who has to determine the nature of the work for which a ship is employed is bound to be guided by the fact that she is classed as a public vessel by the laws or Government regulations of the State to which she belongs, and whether he is therefore precluded from entertaining other considerations. After some very pertinent reflections on this point, the learned Professor concludes in favour of the principle of applying the legislative standards recognized in the country in which the case is tried (*lex fori*). The Conference did not see the need of making this distinction in the draft Convention, and we ourselves do not see any such need, especially in view of the arguments already contained in the Report in favour of this system, and the fact that this question was so clearly put before the Conference both by M. Franck and by the Rapporteur of your Sub-Committee.

We are of opinion that this proposal, the utility and importance of which are manifest, should also receive your approval.

* * *

Another expression used in Article 3 gave rise to certain doubts. This was the term "operated" (*exploités*).

The question at issue is whether the provisions of Articles 1 and 2 of the draft are applicable in the following cases:

(*a*) When the ship is wholly chartered by the State;
(*b*) When the State has taken possession of the vessel by requisition;
(*c*) When the vessel which is employed by the State for commercial work is incidentally carrying goods intended for purposes of national defence.

In our opinion, however, these doubts are not justified. One cannot interpret the provisions of the draft separately; on the contrary, they must be considered as a whole, in combination, in relation to each other.

It will be seen that Articles 1 and 2 lay down a rule, while Article 3 provides an exception. The scope of the rule must therefore be wide and general, while that of the exception must be restricted.

The rule covers not only ships belonging to the State, but also ships which, though not belonging to the State, are operated by it. The term "operated" must necessarily be taken in a wide sense; moreover, if the State is operating a vessel which does not belong to it, it does so because it has fully chartered or requisitioned it.

Take the case of a vessel which has been fully chartered by the State or is employed by the latter exclusively on Governmental non-commercial work. Since it is operated by the State, it follows that it is covered by the exception in paragraph (*a*) of Article 3 of the draft; or, on the other hand, if the vessel is not employed exclusively on Governmental and non-commercial work, it is covered by the rule in Articles 1 and 2.

The same argument applies if the vessel is requisitioned.

As regards the third supposition, the fact that the carriage of the goods is incidental does not affect the matter. What we require to know is:

(1) Whether the vessel is exclusively employed for carrying the goods in question;
(2) Whether the carriage is a Governmental or a public non-commercial service, or a service other than commercial (whatever terms it may be decided to use).

At the Genoa Conference, the Instituto Italiano di Diritto Internazionale proposed to add after "*operated*" the words "*or employed* (*employés*) *in any manner by the State.*"

If the word "operated" is taken in a wide sense, it is clear that it already covers this addition; but we must not forget the words "*and employed*

(*affectés*) . . ." which follow (in Article 3), qualifying the word "*operated*," and which would similarly qualify the words the Instituto Italiano proposes to add.

The Conference did not adopt the Italian proposal.

* * *

As regards the cargo, there was a question of doctrine which gave rise to discussion.

The Gothenburg draft in Article 3, paragraph (*b*), provides an exception for "State-owned cargo carried only for purposes of Governmental work on vessels owned or operated by the State."

The French Association du droit maritime in its report to the Gothenburg Conference argued against the requirement that the cargoes should be carried on a vessel owned or operated by the State.

"We do not perceive," says the report, "why the character of the carrying ship can have any influence on the status of the goods belonging to the State. The one thing that matters is the destination of such goods. If they are intended for public service they must be respected by the creditors, whatever be their character, and consequently whatever be the nature of the carrying ship."

As this argument was not accepted, the French Association returned to it again in its report to the Genoa Conference, laying stress on the possibility that the goods might be seized, and adding that "no State would consent to the possibility of a cargo which it intends for Governmental purposes being seized, even if it were being carried in a merchantship."

M. Franck opposed this contention, pointing out how unjust it would be to grant immunity to State-owned cargoes, even if they were intended for Governmental non-commercial purposes, when they were carried together with other goods belonging to private individuals.

Take the case of general average; all the cargoes have to contribute to make good the common damage and all must be subjected to the same rules of liability and procedure.

This point of view secured the assent of the Conference in spite of the opposition of the French Association and the support given it by the Instituto Italiano di Diritto Internazionale. We also take the same view.

Nevertheless, the text of the Gothenburg draft was modified.

The text provisionally approved by the Genoa Conference reads[1] as follows: ". . . cargoes carried for Governmental and non-commercial purposes on vessels owned or operated by the State . . ."

Some of these differences of wording are not without importance, as, for instance, the insertion of the word "*non-commercial*," which was added to

[1] The final text is to be determined by the "Bureau permanent du comité maritime international." Furthermore, as we have already pointed out, the French translation of the English text of the resolution is also provisional.

restrict the scope of the term "Governmental," and the omission of the words "*State-owned*" and "*only*," which were—and are still in our view—necessary in order to prevent the exception relating to cargoes from acquiring a wider scope than that relating to vessels, and also in order to bring this paragraph (*b*) into line with paragraph (*a*).

In regard to this point we would add a further observation.

We can see no reason why the expressions employed in regard to cargoes should differ from those employed in connection with vessels. So that if we say, in regard to the latter, "employed only on work other than non-commercial work" or "employed only on Governmental non-commercial work" we ought to say, when referring to the cargoes: "carried for other than exclusively commercial purposes" or "carried only for Governmental non-commercial purposes."

C

The third restriction refers to the scope of application of the Convention.

The Gothenburg Draft laid down in Article 4 that "the provisions of this Convention will be applied in every Contracting State in all cases where the claimant is a citizen of one of the Contracting States, provided always that nothing in this Convention shall prevent any of the Contracting States from settling by its own laws the rights allowed to its own citizens before its own courts."

In the preliminary draft this clause was entirely different. In its preamble, the High Contracting Parties undertook that the liabilities which they might incur in respect of sea-going vessels owned by them or in respect of cargoes carried on such vessels should be subjected to the rules laid down.

Some observations were made on this subject at the Gothenburg Conference and attention is called to those which appear in the report of the French Association.

After pointing out the difficulty of arriving at an international unification of law on this question, and after observing that all the Conventions previously adopted at Brussels contained a provision defining their scope of application and limiting it to cases of disputes between parties of different nationalities, the French Association expressed the view that it would be better to state that the Convention would only be applicable in international cases. Since, however, the adoption of such a rule would narrow the scope of the Convention to a far greater degree than was apparently intended by the International Maritime Committee, the "Association" moved the adoption of another rule for which a precedent existed in the Draft Convention of October 26th, 1922, dealing with the liability of the ship owner, namely, that the Convention should be applicable "before the courts of a Contracting State, if one of the parties to the dispute was a national of one of the Contracting Parties, even if the vessel concerned was flying the flag of the State before whose courts the case had been brought."

The French Association therefore proposed to replace the preamble by a new Article numbered 4, which was to read as follows:

> "The provisions of the present Convention shall be applied in every Contracting State in all cases where the creditor interested is not a citizen of the State owning the ship or the goods to which the claim refers."

The Association further proposed that a recommendation should be addressed to the different Contracting States in favour of the adoption of the rules of the Convention for regulating the relations between the ship- and cargo-owning State and its citizens who are creditors of the State by reason of the operation of the ship or the carriage of the goods.

A lively debate ensued at the Conference on this question and various opinions were expressed, some even advocating the rejection of the article as useless and dangerous.

Finally, it was agreed to accept the article as it appears in the draft.

At the Genoa Conference the French Association returned to the subject in its report and again proposed that the scope of the Convention should be modified. The reasons advanced were as follows:

> "The clause regarding the application of the Convention which was moved by the French Association was based on the provision adopted in the Brussels Convention of 1922 regarding the limitation of shipowners' liabilities. The rule laid down at Gothenburg has been drawn as widely as possible in order to multiply the cases in which the Convention would apply. It is only required that the creditor concerned should be a citizen of one of the Contracting States.
>
> "But at present, according to the new draft adopted in 1923 for the clauses of the Convention relating to limitation of liability, the Convention would only be applicable if the vessel in regard to which the liability was incurred was registered in one of the Contracting States or was being operated by one of those States. It seems that a similar alteration requires to be made in the clauses of the draft which relate to the immunity of State vessels; for this draft Convention is concerned, in the first place, with the obligations and liabilities of the State, and in the second place with the right to arrest vessels. From both these points of view it seems preferable to limit its application to vessels and cargoes belonging to one of the Contracting States."

The Rapporteur of your Sub-Committee was able to point out, by taking hypothetical cases and applying to them the article of the Draft Convention and the new text proposed by the French Association, that the latter, although intended to limit the application of the Convention, actually extended it; and he added that he was not opposed to such an extension but that he shared the fears which the French Association had itself expressed in

its former report, namely, that it might endanger the acceptance of the draft by some of the Governments.

After further remarks had been made by M. Franck and others, the Conference, which took the same view as the speakers, declined to approve the new French text.

We consider that, when dealing with so delicate and serious a question, it is best to move cautiously and to keep Article 4 in its present form.

* * *

A new and important restriction was adopted at the Genoa Conference.

The Imperial Economic Conference had inserted an additional Article (5) in the text of the Gothenburg Draft, reading as follows: "This Convention shall not be binding on a belligerent State in respect of claims arising during the period of belligerency."

At the Conference, Sir Leslie Scott proposed a different clause: "Notwithstanding the above provisions, no person shall be entitled in time of war to cause the arrest of a vessel belonging to or operated by one of the belligerent States nor of the cargo belonging to such State or carried on board such a vessel, nor to institute any proceedings against such State before a foreign Court; nevertheless, any person, not being an enemy, who has suffered damage may institute proceedings before the competent Court of the aforesaid belligerent State."

This is the clause which was adopted and we consider that you might also approve it.

The situation created by a state of war is of such a special character and so grave that it fully justifies this restriction.

* * *

The Genoa Conference also added, on the motion of the French Association, an additional clause which requires no justification, to the effect that "the provisions of the Conventions of 1910 and 1922 are hereby modified in so far as they create an exception in respect of all State vessels." The Permanent Bureau of the International Maritime Committee will have to insert this clause in the draft; the French Association had wished to incorporate it in Article 1.

We consider that it ought to become Article 4, the present Article 4 being renumbered 5.

* * *

*Conclusion*

Your Sub-Committee considers that the legal status of Government vessels is a subject the solution of which by way of Convention is both desirable and practicable, and that, in consequence, the Council should be requested, in case the Belgian Government convenes the Diplomatic Con-

ference to deal with this question, to inform that Conference that it supports this action; the Council should, at the same time, give its opinion on the draft which will be submitted. If, however, the Belgian Government should not see its way to convene a Conference, the Council should do so itself.

The solution in question could then be adopted by the representatives of the Governments, and the Gothenburg Convention would be submitted to the Conference with the amendments which we have had the honour to suggest, or with such others as you may think desirable to insert.

(*Signed*) Barbosa DE MAGALHAES,
*Rapporteur.*

J. L. BRIERLY.

## APPENDIX I

### RESOLUTION VOTED BY THE CONFERENCE OF GOTHENBURG (August 15th–17th, 1923)

*Immunity of State-Owned Ships* [1]

*Article* 1.—Vessels owned or operated by States, cargoes owned or operated by States, cargoes owned by them, and cargo and passengers carried on such vessels and the States owning or operating such vessels shall be subjected, in respect of claims relating to the operation of such vessels or to such cargoes, to the rules of liability and to the same obligations as those applicable to private vessels, persons or cargoes.

*Article* 2.—Except in the case of the ships and cargoes mentioned in paragraph 3, such rules and liabilities shall be enforceable by the tribunals having jurisdiction over, and by the procedure applicable to, a privately owned vessel or cargo or the owner thereof.

*Article* 3.—In the case of:

(*a*) Ships of war and other vessels owned or operated by the State and employed only in Governmental non-commercial work;

(*b*) State-owned cargo carried only for purpose of Governmental non-commercial work on vessels owned or operated by the State;

such liabilities shall be enforceable only by action before the competent tribunals of the State owning or operating the vessel in respect of which the claim arises.

*Article* 4.—The provisions of this Convention will be applied in every contracting State in all cases where the claimant is a citizen of one of the contracting States, provided always that nothing in this Convention shall prevent any of the contracting States from settling by its own laws the rights allowed to its own citizens before its own courts.

[1] English text printed from the *Bulletin of the International Maritime Committee* (English edition), page VI.

## Appendix II

### NOTE ON THE RESULTS OF THE CONFERENCE OF GENOA

[*Translation.*]

The Permanent Bureau of the International Maritime Committee has sent to its associates a circular letter dated October 31st in which it gives an account of the results of the Conference of Genoa and makes the following statement in regard to the question of the immunity of State ships:

B. *Immunities of State Ships*

The Gothenburg draft underwent a second reading. This showed general acceptance of the draft. Two amendments were adopted. Article 3, dealing with the position of warships and ships in the public service, is now drafted as follows:

> "(*a*) Warships, State yachts, patrol vessels, hospital ships and other vessels belonging to a Government or operated by it and employed exclusively on other than commercial work;
>
> "(*b*) Cargoes transported for governmental and non-commercial purposes on board ships belonging to or operated by the State:
>
> "Shall not be liable to attachment, and claims relating to them shall be exclusively within the competence of the competent court of the State owning or operating the ships occasioning such claims."

On the other hand, a new Article numbered 5 was added to govern the position, in time of war, of ships and cargoes belonging to a State. The Article is as follows:

> "In time of war, ships belonging to a belligerent State or managed by it, and cargoes belonging to such a State or borne on such ships, shall not be liable to attachment, seizure or detention by a foreign court of justice.
>
> "Actions against such ships or cargoes may, during the war, be brought before the competent court of the State owning or managing such ships or cargoes."

The question is ripe for action and the Permanent Bureau has entered into communication with the Belgian Government with a view to convocation of a diplomatic Conference. There is every reason to believe that this request will be favourably received.

(*Signed*) Barbosa de Magalhaes,
*Rapporteur.*

## Appendix III

### NOTE ON THE AMENDMENTS, SUBSTITUTIONS AND ADDITIONS IN THE GOTHENBURG DRAFT PROPOSED BY THE SUB-COMMITTEE

[*Translation.*]

(*a*) In Article 1, suppress the words "in respect of claims relating to the

operation of such vessels or to such cargoes" and insert them in Article 2 after the words "such rules and liabilities."

(*b*) In Article 3, paragraph (*a*), substitute the word "public" for the word "governmental," and in paragraph (*b*) of the same article for the word "governmental" read "public."

(*c*) Article 4 should be drafted as follows:

"The provisions of the Conventions of 1910 and 1922 are amended in so far as they except all State ships." [1]

Article 4 of the draft becomes Article 3.

(*d*) Add a new article numbered 6 to read as follows:

"In time of war, ships belonging to a belligerent State or managed by it, and cargoes belonging to such a State or borne on such ships, shall not be liable to attachment, seizure or detention by a foreign court of justice.

"Actions against such ships or cargoes may, during the war, be brought before the competent court of the State owning or managing such ships or cargoes."

(*e*) Add further new article numbered 7, to read as follows:

"The High Contracting Parties undertake that, should different interpretations of the provisions of this convention be adopted in various countries, they will request the Council of the League of Nations to obtain the opinion of the Permanent Court of International Justice at The Hague upon the said divergences of interpretation."

(*Signed*) Barbosa de Magalhaes,
*Rapporteur.*

[1] As we said in our report, this provision, which was proposed by the French Maritime Law Association, was approved by the Genoa Conference, and the Permanent Bureau was to insert it in the draft. We do not understand why it is not included in the Bureau's circular letter reproduced in Appendix II.